SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 402

MARVIN STUART WALTON, PETITIONER,

vs.

PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, APPELLATE DEPARTMENT, IN AND FOR THE COUNTY OF SANTA CLARA

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IN THE MUNICIPAL COURT FOR THE PALO ALTO-MOUNTAIN VIEW JUDICIAL DISTRICT, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA

ALFRED W. BOWEN, Municipal Judge

CHARGE: Violation of Section 502, California Vehicle Code
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

MARVIN STUART WALTON, Defendant

Held May 21, 1953, at 10:00 o'clock a.m. Before Alfred W. Bowen, Judge.

APPEARANCES:

For the People: Without counsel.
For the Defendant: Philip A. DiMaria, 652 University Ave., Palo Alto, California.
Stenographic Reporter: S. J. Richardson.
The following proceedings were had and testimony given:

ARRAIGNMENT—May 21, 1953

The Clerk: Marvin Stuart Walton.
The Court: Marvin Walton, S.R., is that it?
The Defendant: Yes.
The Court: What is this S.R.?
The Defendant: No initial, Your Honor.
The Court: Is your name Marvin Walton?
The Defendant: That is correct.
[fol. b-2] The Court: Do you have a driver's license?
The Defendant: Yes, Your Honor.
The Court: Let me see it.
The Defendant: I didn't bring it with me, Your Honor.
The Court: Did you drive here to this court?
The Defendant: No, I didn't.
The Court: I wonder where they got this abbreviation in this name?
The Defendant: Stuart, sir. It is the middle initial.

The Court: All right. You are charged on the 8th day of May with a violation of Section 502 of the Vehicle Code—operating an automobile while under the influence of intoxicating liquor within the geographical jurisdiction of this Court. Are you prepared to plead at this time?

The Defendant: Yes, Your Honor. Not guilty.

The Court: Do you have bail up?

The Defendant: Yes, Your Honor, I do. It is posted in San Jose.

The Clerk: Two hundred ninety dollars.

The Court: Posted—is that a cash bail?

The Clerk: Yes.

The Court: All right. When do you want the trial?

Mr. DiMaria: Mr. Walton would like to request a jury trial on each of the charges; there is 502, 510, 511, [fol. c-3] and 250.

The Court: Is that right?

The Clerk: That is right.

The Court: Where is the rest of the Complaint?

The Clerk: According to this, we are only charging with a 502.

Mr. DiMaria: They are on the traffic ticket, of which I have a copy.

The Clerk: The traffic ticket shows all of them, but the Complaint shows only 502.

Mr. DiMaria: The charge is only 502?

The Court: Yes.

Mr. DiMaria: The Defendant would then like to request a jury trial on the charge of 502, that is, on the assumption there are no other charges; and I would appreciate, Your Honor, if the Court would grant me four weeks' time before the trial, at least that.

The Court: All right. Let's get our calendar here. If you are ready to waive time, we can set it any time.

Mr. DiMaria: When do you have to leave, Mr. Walton?

The Defendant: I will be leaving the 7th of July from New York, and I leave here a week prior to that.

The Court: You can have a chair in the meanwhile until she brings back the book.

Mr. DiMaria: All right, all right. We have no desire to have an early trial at all. Mr. Walton will be gone

[fol. d-4] for at least four or five months to Europe. He will be leaving July 1st. Now, as far as we are concerned, we are perfectly happy to receive the trial date after that time.

The Court: Let's just take a look. We have Tuesdays and Thursdays available for trial. Let me see if there is anything in June, because if there is we can dispose of it. Otherwise we will continue it until after he comes back, as long as there is bail up, and I suppose that is agreeable to the Highway Patrol. Did you have a blood test taken?

The Defendant: Yes, I did.

The Court: Well, then, there is no obstacle to putting it over. You wanted at least four weeks, Mr. DiMaria?

Mr. DiMaria: Yes, I would, Your Honor.

The Court: Then that would bring it to the end of June. Then we had better bring it to some time in the fall, and if you want it in four weeks, that leaves just the last week in June, and that is taken, so it couldn't be in June.

Mr. DiMaria: Well, would there be any objection to continuing it for a year?

The Court: Why don't you waive the jury and try it by the Court and we can dispose of it before he leaves?

The Defendant: Well, I imagine—could we have a jury trial at the last of June, then?

[fol. e-5] Mr. DiMaria: Well, I can't—by the last week of June, Your Honor, do you mean beginning with the 22nd day?

The Court: Well, the last week in June. All I have is Tuesdays and Wednesdays, and the last Tuesday and Wednesday—wait a minute. The last Tuesday is the 30th. We have already got a jury trial set for all day.

Mr. DiMaria: How about the 23rd?

The Court: Well, the 23rd and 24th I have got filled up.

Mr. DiMaria: 25th, that is a Thursday.

The Court: I can't take it on a Thursday. It must be on a Tuesday or Wednesday for jury trial.

Mr. DiMaria: Tuesday or Wednesday?

The Court: Yes.

Mr. DiMaria: 24th is filled?

The Court: Everything after the last three weeks are filled.

Mr. DiMaria: What about the 17th, is that open?

The Court: The 16th and 17th are jury trials. There is one on each day.

Mr. DiMaria: I think it ought to be carried over into next year, or later on.

The Court: When does he expect to be back?

The Defendant: I might be gone three or four months, Your Honor, or it may be a year, depending upon events I can't foresee.

[fol. f-6] Mr. DiMaria: Should I say six months, and if he isn't back have it continued again?

The Court: Well, frankly I wouldn't want to make that sort of a postponement without us having the District Attorney in on it. I would like to have him in on it and see what he wants to do about it. Suppose in the meantime we postpone it for one week for the purpose of considering it for trial, if you will waive the 30-day limitation at this time.

Mr. DiMaria: The Defendant agrees to waive the 30-day limitation.

The Court: Then you get in touch with him during the week.

[fol. 7] In the Municipal Court for the Palo Alto-Mountain View Judicial District, County of Santa Clara, State of California, Branch No. 1.

Alfred W. Bowen, Municipal Judge, and a Jury

[Title omitted]

Appearances:

For the Plaintiff: Jerome W. Feeley, Esq., Deputy District Attorney.

For the Defendant: Philip A. DiMaria, Esq.

Impaneling of Jury—April 7, 1954

The Clerk: Marvin Stuart Walton.

Mr. Feeley: Ready, Your Honor.

The Court: Ladies and Gentlemen of the panel, you have been requested to appear today as jurors in a case involving what is commonly called drunk driving—driving an automobile while under the influence of intoxicating

liquor, in the case of People of the State of California against Marvin Stuart Walton. At an appropriate time we will ask the people who are going to present this matter and the Defendant to stand so that you can look them over [fol. 8] and see who they are. But at this time I want to ask if any of you are government employees?

Clifford Russell: I am.

The Court: What is your name, please?

Mr. Russell: Clifford Russell.

The Court: Clifford Russell?

Mr. Russell: Yes, sir.

The Court: Thank you.

Are there any of you who are unable, for medical or physical reasons, to serve as jurors, and have an affidavit or a certificate of a doctor with you to that end?

Mr. Smith: I have no certificate.

The Court: What is your physical disability?

Mr. Smith: I have blood poisoning in my foot.

The Court: That wouldn't interfere with your acting as a juror for one day, would it?

Mr. Smith: No, sir.

The Court: When your name is called, the Clerk will call the roll now for the purpose of ascertaining who are here. Will you kindly rise so we can see who you are, and state the mileage. First of all, state whether your address has been changed, and also give us the mileage from this Courthouse to your home in even miles; that is, if you are within one mile, it will be a mile; if you are more than one mile, and less than two, it will be two, and so on. That is for the purpose of determining the mileage fee which [fol. 9] will be included.

You may call the roll, please.

(Whereupon, the Clerk then called the roll.)

The Court: Now, Ladies and Gentlemen of the panel, the next procedure will be for the Clerk to draw from the jury box here at random, 12 names for selection as jurors. The first one called will be Juror No. 1. He will take this seat in the front row, No. 1 nearest to this wall. Next will be 2, 3, 4, 5, 6. No. 7 will be the first seat in the back row next to the wall, 8, 9, 10, 11 and 12. Now, after those 12 have

been so selected, the attorneys will have the right to question you as to your qualifications to sit as jurors, and it will be your duty to answer honestly and briefly any questions of that nature which are propounded to you by counsel. For that reason you will all, at this time, please rise and take the oath which the Clerk will administer.

(Whereupon, the prospective jurors were duly sworn to answer questions pertaining to their qualifications to act as jurors.)

The Court: You may be seated. All right. Draw the names.

(Whereupon, the Clerk then drew 12 names from the box and the prospective jurors were seated in the box.)

The Court: Now, before we proceed any further, the Court would suggest that all of the prospective members of the Panel move up so that you can hear everything that may [fol. 10] be said, because you may be selected in place of some of the 12 who are already here.

Now, Ladies and Gentlemen of the jury, this case is, as stated before, a case between the People of the State of California on the one side, the Plaintiff, and the Defendant, Marvin Walton. The People are represented by Mr. Jerome Feeley, who is Deputy District Attorney. This is Mr. Feeley here. Mr. Walton is this gentleman sitting here. Will you please stand, Mr. Walton? Thank you. Mr. Walton is the Defendant, and Mr. DiMaria is the gentleman sitting here, his attorney.

The issues in this case are made by the Complaint which has been filed against Mr. Walton, and his denial by pleading not guilty. Those are the issues which will be submitted for trial in this case.

The Complaint is that on the 8th day of May, in 1953, the Defendant is accused of having committed a misdemeanor, which is that on that date, while under the influence of intoxicating liquor, and while so under the influence, did then and there willfully and unlawfully drive a vehicle upon a highway; to-wit, El Camino Real in this judicial district. As I have told you before, counsel will have the right to examine you in regard to your qualifications to

sit as jurors, and all of you other Ladies and Gentlemen should listen carefully to such questions as may be asked, because counsel may in a general way ask you if you [fol. 11] have heard the previous questions in order to save time; and in which case you would have to, of course, be able to say that you had heard them so that you could answer the questions.

You may proceed, Mr. Feeley.

(Whereupon, there followed the voir dire examination of the prospective jurors until 12 were finally selected to sit as the jury.)

The Court: Any further peremptories?

Mr. Feeley: No, Your Honor.

Mr. DiMaria: Just a moment, Your Honor. We have no other challenges, Your Honor. The jury is satisfactory to us.

The Court: All right. The rest of the prospective jurors in the panel who have not been called are now excused. The Court takes this opportunity to thank you for your interest and presence here at this time. You may leave.

Now, Ladies and Gentlemen of the Jury, you have been selected and accepted by counsel on both sides as the jury to try the issues in this case. We are going to take a ten-minute recess so that those of you who would like to may use the telephone, or the rest rooms to the left here in the hall, and the Court would like to caution you at this time, to give you what we call an admonition, a warning, that you as jurors in this case are under the duty not to converse among yourselves, and even more so with anyone else [fol. 12] on any subject connected with this trial, or to form or express any opinion on it until such time as the case is submitted to you, which will be, of course, after the testimony is concluded, counsel have had an opportunity to summarize and present their argument, and the Court has instructed you, but until that time you are not to talk with anybody, or even among yourselves. Before we take that recess, will you all rise now and take the oath, this time as jurors. Last time you were taking it to answer the questions that might be propounded to you. This time you

are taking the oath to act as jurors in this case. Will you please rise?

(Whereupon, the jury was duly sworn to try the case.)

A Juror: May I ask one question: How long do you anticipate the trial to take?

The Court: Probably one day. We have never had one of these go more than one day. Counsel can tell us, perhaps, better than anyone.

Mr. Feeley: As far as I am concerned, I will probably be finished this morning.

Mr. DiMaria: You will be finished when? It shouldn't take more than a day.

The Court: We will take a ten-minute recess.

(Whereupon, a short recess was taken, after which the following proceedings were had:)

[fol. 13] The Court: Let the record show that the jury is all present and the Defendant and counsel.

Mr. Feeley: Mr. Shannon.

CLIFTON OWEN SHANNON, called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Feeley:

Q. May I have your full name, sir?

A. My name is Clifton Owen Shannon.

Q. And your occupation, Mr. Shannon?

A. I am a State Traffic Officer.

Q. California Highway Patrol?

A. California Highway Patrol, yes, sir.

Q. Were you so employed on the 8th day of May, 1953?

A. Yes, sir.

Q. And what were your duties on that date, sir?

A. Well, on that day, or on that month, we were on duty on the El Camino and side roads.

Q. And was that in the Palo Alto-Mountain View area?

A. Yes, sir.

Q. Were you on duty, sir?

A. Yes, sir.

Q. And did you have occasion to be on the El Camino during the evening of the 8th of May, 1953?

A. Yes, sir. Many times.

Q. And were you alone at that time?

A. No. Officer Daly was with me.

[fol. 14] Q. And were you in a Highway Patrol vehicle?

A. Yes, sir.

Q. And were you driving, or Officer Daly?

A. I was driving.

Q. Now, was your occasion drawn at any time—or your attention drawn to the Defendant, Marvin Walton, at any time?

A. Yes, sir.

Q. Approximately what time of day was that, sir?

A. Well, it was in the evening. I would say shortly before 10:00 p.m.

Q. All right. And you were proceeding in what direction on El Camino, sir?

A. We were going north on the El Camino Real, just north of Rickey's Restaurant.

Q. And it was about 10:00 p.m. And what was the condition of traffic?

A. Fairly heavy.

Q. What first drew your attention to Mr. Walton, sir?

A. Well, as we approached the area around L'Omelette Restaurant, we noticed this car driving out of the parking area of that restaurant directly across the southbound traffic lanes, and he sped out into the inside lane ahead of a car which was just ahead of us.

Q. All right. And what did you see? Just what happened, sir?

A. Well, he entered the highway at a pretty good rate of speed, and cut in over the double line in front of this [fol. 15] vehicle which was in front of us, and he took off at a higher than normal rate. In other words, the speed limit up there is 35, and most of the vehicles are going 30 to 35 miles an hour, and this particular vehicle exceeded

that, and in rounding the area around Ferranti's Restaurant, he brushed up against the traffic island on the inside of the highway and ricocheted a little, and then he cut over into the outside lane, still northbound, and picking up speed, and he found an opening in there and he kept on going—accelerating. We were boxed temporarily, and I had my red lights and siren on, and I did something I very seldom like to do—and in order to get after this vehicle, we had to pass over the double line, and that broke us out into the open, and then we swung over into the outside lane and clocked Mr. Walton from there on up to Fernando Avenue.

Q. And at what speed were you going at that time, sir?

A. We were doing 60 to 65 miles an hour, right behind him.

Q. All right. And did you bring Mr. Walton to a stop, sir?

A. Well, just as we approached the area up around Wilton Avenue, he became aware of the fact that we were behind him, or trying to stop him, and he looked as though he were going to pass on the east shoulder. In the meantime, there was traffic ahead of him by that time, and it looked as though he were going off——

Mr. DiMaria: Your Honor, I object to "what it looked like."

[fol. 16] The Court: Objection overruled.

A. (Continuing) He was on the shoulder. There is no "looked like" about it. I just used the wrong choice of words. So we thought—or, I can't speak for Officer Daly—I thought that he was going to cut around and pass to the right.

Mr. DiMaria: I object to what he thought, too, Your Honor. He should testify to what he saw; not what he thought. It is opinion.

Mr. Feeley: All right. Just what you saw.

A. Well, I saw him start to pass around to the right, and I made preparations to take out after him again, but in the meantime he started braking, and by this time he was on the east shoulder up near Fernando Avenue, and he

started fish-tailing over onto the unimproved shoulder, and there there was another vehicle coming out of Fernando Avenue, waiting for clearance onto the El Camino, and the Walton car just missed striking the front of this vehicle as he fishtailed in toward a dead end.

By Mr. Feeley:

Q. What do you mean by "fish-tailed"?

A. Well, he was going something like this (indicating). His rea*d* end was whipping.

Q. I wonder if you might make a diagram of that area, sir. It is not too clear to me, and I don't know if it would be to the jury.

A. Which area?

[fol. 17] Q. The area from the L'Omelette to where Mr. Walton was stopped.

A. The whole highway?

Q. I don't know how much space was encompassed.

A. I can make a diagram of the area around Ferranti's where the traffic island is. There is a slight break around Ferranti's—that is going to be too large, I can see that, in order to get the whole area in. That is a four-lane highway in that area, and Ferranti's Restaurant would be off onto the west shoulder, in that area. This is a left turn lane off the El Camino, and this is the traffic island with chatter bars down to the south, and then across the intersection there is, of course, another traffic island, and a left turn lane for people who want to cross over that way, and this is for that method of turning, and this is what we call the N-2 lane, or the inside northbound. This is the N-1. And over here we have a similar set-up of South-1 and South-2. L'Omelette is down the road to the south of here, and it was in this area where the Walton car, in trying to get around vehicles ricocheted off this island, then cut over and got into the N-1 lane, and from here it is a straightaway all the way to Fernando Avenue.

Q. Now, where does the old highway cut in with reference to the diagram?

A. What old highway?

Q. The old 101 Highway?

[fol. 18] A. The old 101 comes in on an oblique angle, it

is a two-lane road, and there is a stop limit here, and to make a left turn they would have to go around through here, south.

Q. You mentioned Wilton Avenue; is that correct?

A. That was up at the other intersection about a half a mile north of here.

Q. I see. And Fernando Avenue; where is that, sir?

A. That is the last street this side of Palo Alto City Limits.

Q. I see. So that would be a quarter, or half a mile down the road?

A. From this point it is a half a mile.

Mr. Feeley: All right, Cliff, sit down again.

By Mr. Feeley:

Q. Now, if I may repeat, Your Honor, with reference to this diagram, L'Omelette is down here on the left here?

A. Yes, sir.

Q. And you were proceeding in the N-1 lane?

A. No, we were in the inside lane, the N-2.

Q. The N-2?

A. Yes, sir.

Q. And Mr. Walton came from the L'Omelette Restaurant?

A. Yes, sir.

Q. And that was down this way some distance?

A. Yes, sir. It is south of there.

Q. You say he cut in front of another car ahead of you?

A. Yes, sir.

Q. Was that other vehicle also in the N-2 lane?

[fol. 19] A. Yes, sir. I was right behind him.

Q. Right behind him. All right. As he proceeded up, say, northbound in this direction, he struck this traffic island; is that correct?

A. Yes, he ricocheted off it.

Q. And veered to his right?

A. Either veered, or cut, anyway the vehicle went over to the right.

Q. And did he then travel in the N-1 lane thereafter?

A. He did his passing in the N-1 lane, and north of

there I had to pass over the double line to get behind him.

Q. North of this location, in this direction up here?

A. Yes, sir.

Q. You went across the double line to get behind him?

A. Yes, after we cleared this intersection, in order to get around the two cars in front of us on the N-2 and N-1 lane I had to pull over the double line with my light and siren in order to overhaul Mr. Walton.

Q. Did you have your red light and siren on all this time?

A. Yes.

Q. And up to where you stopped Mr. Walton?

A. Yes, on the east shoulder.

Q. And you were following directly behind him for some distance?

A. Yes, the last half of that distance we were both right behind him in that N-1 lane.

[fol. 20] Q. At 60 miles an hour?

A. 60 to 65 miles an hour, yes, sir.

Q. Now, you say he fish-tailed. Was that at the Wilton Street intersection, or Fernando?

A. No, that was at Fernando where we finally brought him to a halt.

Q. Is that a right-angle intersection?

A. Yes, it is a T-angle. El Camino goes north and Fernando comes from the east and stops. In other words, it is a right angle, a T.

Q. Assuming—take this area here, say this to be Fernando Street intersection——

A. Yes.

Q. —was this other vehicle you were speaking of stopped here at this location?

A. He was stopped at the limit line waiting for clearance onto the El Camino.

Q. And Mr. Walton fish-tailed. When Mr. Walton fish-tailed, was he in the N-1 lane, or on the shoulder?

A. Shoulder.

Q. Did he pass across the front, or to the rear of that vehicle?

A. Across the front.

Q. With reference to that intersection, did he stop just beyond the intersection?

A. We stopped him at the northeast corner of the intersection. There is a little old abandoned real estate office [fol. 21] there at the intersection, and he was right in front of it.

Q. All right, sir. And then what happened at that time?

A. Well, Officer Daly left the patrol car by the right side and I had to go around out on the left, and when I cleared the rear of the patrol car Officer Daly had taken the keys out of Mr. Walton's car and was telling him to get out. So I stayed in the background while Officer Daly and the Defendant walked to the rear of the Defendant's car and alongside ours.

Q. I see. Then just what was done, or what was said?

A. Well, Officer Daly——

Mr. DiMaria: I object to what Officer Daly said.

By Mr. Feeley:

Q. It was in your presence?

Mr. DiMaria: It is still hearsay.
Mr. Feeley: It is in his presence.
Mr. DiMaria: I object to it as being hearsay.
The Court: In the presence of the Defendant, he means.
Mr. DiMaria: I object to it as being hearsay.
The Court: Objection is overruled.

A. Well, Officer Daly asked him to come back to the rear of the car so we could interrogate him. So they walked to the rear of the car, and Officer Daly asked him what he had been drinking, or if he had been drinking, and what was the idea of speeding down on a crowded highway.

By Mr. Feeley:

Q. Just go ahead.

[fol. 22] A. And Mr. Walton was very uncooperative. We couldn't find out his name at the time, and he objected to Officer Daly having the keys to his car, and so after we saw we weren't getting anywhere, why—and the fact that Mr. Walton had been staggering around and leaned up against the side of the patrol car while he had been

talking to us, Officer Daly decided we had better put him in the patrol car and take him to San Jose.

Q. Did you ask him for his driver's license?

A. Officer Daly did.

Q. Did he exhibit his driver's license?

A. He didn't until after we were in the patrol car; then he produced a British driver's license and a Florida driver's license, but no California license.

Q. And at the scene did you give him any equilibrium tests, at the scene where you stopped?

A. We just observed the way he was walking and talking.

Q. How did he walk at the time?

A. He staggered very noticeably, as I said, before he leaned up against the patrol car while we were talking to him, and we told him to stand out on his own two feet.

Q. And his talking, sir, how did he talk?

A. Well, he was repetitious. He would pick up a phrase and just keep repeating it over and over, and we would ask him a question and he wouldn't answer it. He kept saying, "What are you stopping me for?" and "What have I [fol. 23] done?" and also asking for cigarets time and time again. We asked him his name, and he wouldn't tell us. We asked him—after we finally found out what we thought his name to be from his credentials we asked him which name was he known by, the first or the middle, and he refused to tell us that, he just laughed. He had a funny kind of a rising inflection to his laugh; it was very peculiar. I used to be able to imitate it, but I can't today, and he would give that laugh every time we would ask him a question; and so finally I said, "We will have to know more about you than that. What is your first name?" And he said, "Well, in California they call me 'Mother.'" And I don't know why he said that, but——

Q. Did you then proceed to the Accident Bureau?

A. Yes, sir, we did.

Q. And that is located in San Jose?

A. San Jose; South Market Street.

Q. All right. And did you have any further conversation while on the way to San Jose?

A. Well, on the way in we were trying to get information from him. He spoke with what I thought to be a

British accent, and I asked him where he had acquired it. I thought we had a British subject in custody by the fact that he had a Great Britain driver's license, and I was curious as to who he was and where he lived.

Q. And what did he say in that regard?

A. I don't remember how he explained the accent. He [fol. 24] kind of laughed about it.

Mr. DiMaria: I beg your pardon. What was that statement, you don't understand how he explained what?

A. I don't remember how he explained how he picked up to be—what I thought to be—a British accent.

Mr. DiMaria: I see.

By Mr. Feeley:

Q. Did you ask him about his drinking, sir?

A. Officer Daly did most of the talking. I was driving.

Q. Well, did you hear any conversation with regard to drinking?

A. Yes, he said he had some drink at the L'Omelette.

Q. Is there anything else that you recall by way of conversation on the way to San Jose?

A. Well, he said that he had always held the California Highway Patrol in the greatest esteem; he thought we were a good group of boys, but he said he was going to change his opinion of us from now on, or from then on, and he kept repeating, as I said before, "What are you arresting me for? Where are we going? May I have a cigaret?" And so on, like that.

Q. Now, when you arrived at the Accident Bureau in San Jose, sir, what happened at that time?

A. Well, Officer Daly asked Mr. Walton if he would take a sobriety—a Rhomberg sobriety, and Mr. Walton, according to the form here, filled out by Officer Daly, re- [fol. 25] fused to cooperate. We asked, "Where did you start from?" "Why," he says, "Stanford." "Where were you going?" and he says, "Home."

Mr. DiMaria: Your Honor,—that is Officer Daly's report you are reading from?

The Witness: Yes, sir.

Mr. DiMaria: I object to that as being hearsay.
The Witness: I can remember all that.

By Mr. Feeley:

Q. Was it all in your presence?
A. Yes.

Mr. DiMaria: I still object to what Officer Daly said in his presence or out of his presence.
The Court: Objection overruled; you may continue.
Mr. DiMaria: May I make the objection continuous, sir, to avoid repetition?
The Witness: We have forms here, standard forms, and to all the questions the answers were, "No comment." "No comment." And I merely drew this paper out of my pocket to remember some of the questions. I don't have to worry about the answers to those questions. There was "No comment" to all of them.

By Mr. Feeley:

Q. All right. Now, the Rhomberg test, sir, what does that consist of?
A. Well, it consists of testing equilibrium, as standing erect on your two feet, and there are many varieties of it. Closing your eyes, holding your hands out to the side, and [fol. 26] we watch the swaying of the subject, and then it also consists of standing on one foot and swinging the other one straight to the front and backwards; and also walking on a white or dark line to test their walking ability. He refused to take all that.
Q. Did he say why he refused?
A. I don't remember the exact words as to why he refused, but he did say, when asked why he was so uncooperative and belligerent, he stated he considered our attitude unreconcilable with decency. I guess that would sum it up as to why he would refuse to cooperate.
Q. Now, while at the Accident Bureau, Mr. Shannon, did you request that a sample of Mr. Walton's blood be taken?
A. Yes, sir.
Q. And was a blood sample taken?

A. Yes, sir.
Q. In your presence, sir?
A. Yes, sir.
Q. Do you have that envelope with you?
A. I have the envelope.
Q. Was it taken in your presence, sir?

Mr. DiMaria: Just a moment. May I see that first?

The Court: You can proceed with your questions while he is looking at it, so we don't take too much time.

By Mr. Feeley:

Q. Does your name, or initials appear on the envelope?
A. No, they don't.
Q. Officer Daly's?
A. Yes, sir.
Q. Signed in your presence?
A. Yes, sir.
[fol. 27] Q. And was Mr. Hamre there?
A. He is on there too.
Q. Mr. Hamre is the technician who took the blood?
A. Yes, sir.

Mr. Feeley: I will offer that for identification at this time, Your Honor.

The Court: All right. This exhibit will be—any objections?

Mr. DiMaria: I object to the introduction of the instrument as hearsay.

The Court: It is for identification.

Mr. DiMaria: All right for identification. Not to be introduced into evidence.

The Court: This instrument will be marked People's Exhibit No. 1 for identification purposes at this time.

(Whereupon, the above-mentioned document was marked People's Exhibit No. 1 for identification.)

By Mr. Feeley:

Q. Now, Mr. Shannon, as a result of your observations of Mr. Walton's driving, and thereafter, what, in your opinion, was his condition with regard to intoxication, or sobriety?

A. It was my opinion that he was definitely under the influence of intoxicating liquor.

Mr. Feeley: I have no other questions, counsel.
The Court: You may examine, Mr. DiMaria.

Cross-examination.

[fol. 28] By Mr. DiMaria:

Q. Now, do you remember what time you picked up Mr. Walton and forced him off the highway, as you say?
A. It was around 10:00 o'clock in the afternoon, or the evening.
Q. Around 10:00 in the evening?
A. As near as I can recollect; yes, sir.
Q. I show you this Notice to Appear, signed by Officer Daly. Was that signed in your presence?
A. That was written in my presence.
Q. That was written in your presence?
A. Yes, sir.
Q. And where was this written?
A. At the County Jail.
Q. At the County Jail. Then Mr. Walton was taken from Palo Alto to the County Jail without any charge being presented to him at that time; is that correct?
A. I don't quite understand the question.
Q. Well, is this the first time that Mr. Walton was charged with violation of Section 502, when this was written out and signed by Officer Daly?
A. He was told why we were taking him in.
Q. But he was not handed his ticket there, was he?
A. No.
Q. Now, Officer Daly charged Mr. Walton with speeding; didn't he?
A. Yes, sir.

[fol. 29] Q. And you have stated that you observed Mr. Walton leaving L'Omelette; is that correct?
A. He came in from the direction of L'Omelette at about a 45-degree angle to our course.
Q. In other words, you saw him come off of the highway, onto the highway in front of L'Omelette's?

A. He was coming across the highway diagonally in front of us when I saw him; yes, sir.

Q. And that was right opposite L'Omelette that you saw that happen?

A. Yes, sir.

Q. And did you give chase immediately to Mr. Walton?

A. Yes, sir.

The Court: Just a minute. It is 12:00 o'clock, and normally we would recess at this time for lunch. I think in view of having gotten kind of a late start we had better take a minute to look the situation over and see what the time element may be here. How much time do you suppose, Mr. Feeley, that your testimony will take?

Mr. Feeley: Well, Officer Daly, I understand, his sister died last night, so he won't be here. But I have two witnesses here from San Jose, and Mr. Hamre is the technician. He shouldn't be very long; and Mr. Bradford, how long he will be will depend on Mr. DiMaria.

The Court: Well, in time, how much time do you estimate it may take? I am just wondering whether we ought to ask the jury to shorten their lunch hour a little and I [fol. 30] want to figure out first what the time element may be. What I had in mind was that the jury might prefer to shorten the lunch hour than to have the trial lengthened out at the end of the day. Could you give me some idea of how long you think it might go?

Mr. DiMaria: Well, Your Honor, if we eliminate the question of the amount it will take Mr. Feeley to cross examine my witnesses, I won't take any more than possibly one hour to put my witnesses on. And I might say, probably cross examination of Mr. Feeley's witnesses may be a half-hour.

The Court: Then, in that event, the Court has already committed itself to take a criminal case in Palto Alto at 1:30.

Mr. Feeley: Your Honor, Mr. Bradford sent me a note he is due in another court this afternoon. Would it be possible to call him out of order?

The Court: I was thinking we might go through until 12:30 now, if the jury is willing; then resume again at

1:45, which would give about an hour and a quarter for lunch. Would that be agreeable to you?

Mr. Feeley: Yes, anything is agreeable to me in that regard.

The Court: Ladies and Gentlemen of the jury, you have heard the discussion here with respect to the time. You understand without my repeating it, what the purpose is. [fol. 31] I would like to shorten the time, if we can, at the other end of the line, and I am wondering if you would be willing to keep taking testimony here until 12:30 and then get back at a quarter to 2:00, which will give you only an hour and a quarter instead of the usual two hours. Would you be willing to do that, or would you rather run it later?

A Juror: Is it necessary to take that long for lunch?

The Court: I don't know where you are going, or if you had in mind that the government pays for your lunch.

A Juror: We are not worried about that.

The Court: Normally they just find restaurants around here and come back. It is just a question of whether you will take less than the two hours you are entitled to. Then we will proceed until 12:30, and in view of Mr. Bradford's having to go, would you be willing to take this witness off now, and take Mr. Bradford now and resume with him?

Mr. DiMaria: Yes.

The Court: All right. You may step down, Mr. Shannon.

Mr. Bradford, will you come up, please?

(Witness excused.)

Lowell W. Bradford, called as a witness on behalf of the People, being first duly sworn, was examined and testified as follows:

[fol. 32] By Mr. Feeley:

Q. What is your full name, sir?

A. Lowell W. Bradford.

Q. And your occupation?

A. I am the Director of the Laboratory of Criminalistics for Santa Clara County.

Q. For how long have you been in Santa Clara County, sir?

A. A little over six years.

Q. Where were you employed prior to coming to Santa Clara County?

A. I was employed by the California State Department of Justice in Sacramento.

Q. Doing the same type of work, sir?

A. Yes.

Q. What does your work routine consist of, sir?

A. My work is simply the analysis by means of scientific techniques of any kind of evidence that might be submitted to the laboratory by any one of the law agencies in the County of Santa Clara.

Q. All right. Now, is a portion of your work the analysis of blood samples?

A. Yes.

Mr. Feeley: Will you stipulate to his qualifications?

Mr. DiMaria: Yes.

By Mr. Feeley:

Q. Where did you go to school, Mr. Bradford?

A. At the University of California, in Berkeley.

Q. And what degrees did you obtain, sir?

[fol. 33] A. I have the degree of Bachelor of Science in Chemistry.

Q. And when did you obtain your degree?

A. My degree was in 1941.

Q. And following that did you go to the State Department of Justice?

A. Not immediately, but later, yes.

Q. All right. Now, in the field of blood alcohols, what has been your experience, sir?

A. My experience began really in college through experimentally determining the amount of alcohol in blood. It continued with my service in the State Department of Justice, and has been continuously active in connection with blood testing for the past six years here in this county. That consists of analyzing blood and working with the blood testing program in connection with alcohol in several thousand cases. In addition to the analysis part

of the work, I have had a certain amount of experience in evaluating results. In other words, taking the results of the blood test and evaluating what effect that would have on an individual.

Q. All right. And have you studied any other publications in this particular field?

A. Yes, I have studied all the available material in the field.

Q. They are generally put out by what association, sir?

A. Publications occur by various people specialized in [fol. 34] chemical and medical aspects of this problem, and they appear in the scientific journals in the field of chemistry and medicine. The National Safety Council has put out publications that consolidate these materials.

Q. Have you written any publications yourself, sir?

A. Yes.

Q. In the same field?

A. Yes, sir.

Q. Now, I will show you this People's 1 for identification and ask you if your initials, or name, appears there?

A. My initials are here, yes.

Q. And does that indicate, sir, that you received that sample?

A. It does.

Q. And where did you receive it?

A. At the refrigerator in the San Jose Police Department Accident Investigation Bureau.

Q. All right. And did you have occasion to test that sample of blood to determine its alcoholic content?

A. Yes.

Q. Where was that done, sir?

A. At the Laboratory of Criminalistics, at the County Hospital, in San Jose.

Q. All right. And what percentage of alcohol did you find present, sir?

A. The sample contained——

Mr. DiMaria: Did he say he took that himself?

By Mr. Feeley:

Q. It was tested in your laboratory?

[fol. 35] A. It was, yes.

Q. By you, or under your direction?

A. My records don't indicate who made the test. If it wasn't made by me, it was made under my direction.

Q. What percentage of alcohol was found present?

Mr. DiMaria: I object to that question, Your Honor; it is hearsay, on the ground he didn't make the test himself.

The Court: Objection is overruled.

A. The sample was found to contain 24/100 of 1 percent of alcohol; that is .24 percent.

By Mr. Feeley:

Q. All right. Now, would you please explain to the jury just what the significance of a percentage of .24 is, sir?

A. Well, the over-all significance is that this amount of alcohol in the body will produce a certain amount of brain depression, and it has been my experience that when the amount is this high, that in addition to producing measurable losses of reaction time in manual dexterity and visual acuity, possible behavior changes, that there is ordinarily at this level a loss of walking and talking ability.

Q. I wonder if you might—would you mind demonstrating, Mr. Bradford, just what, starting from no alcohol, just what the significance is?

A. I have placed on the blackboard a chart which shows two columns which I have headed with the words "Effect" and "Percent." The percent meaning the chemical test of [fol. 36] the amount of alcohol present in the blood.

I have shown that, at the top of that column, 0.00, which is the condition when the person has not ingested any alcohol. So we could put opposite that figure, "No drinking." In other words, the normal body state is one in which there is no alcohol present in the body. When alcohol is consumed, it goes to the digestive tract and from there is distributed by the blood stream to all parts of the body, not only in the blood, but in all of the water content of the body, and in the process of this distribution, of course, some of it gets into the brain in proportion, again, to the total amount present in the body.

The alcohol, upon being in the brain, depresses brain

functions in proportion to the amount which is there, and it is possible to make tests on people in various stages of influence, that is, various amounts of alcohol in the water content in the body, and to correlate the results, and that is what I am doing here. The blood sample is merely a convenient sample of the over-all water content of the body.

I have placed at the bottom of the percentage column, figure 50, .50, 50/100 of 1 percent. When the amount of alcohol is this much, the brain is depressed so much that breathing and heart beat can stop, and death can be caused. So we can put that this is the approximate region where death can be caused by high level of alcohol. This range, then, from 00 to 50 is what is found in laboratory practice.

[fol. 37] Now, I have placed the figure .05 in the proper place, and from 00 to .05 we have found that persons with that amount of alcohol in their body show no outward manifestations of alcoholic influence, or intoxication. They do feel themselves the effects of the alcohol, and upon questioning, can give various reactions that they feel, but outwardly it hasn't been possible, ordinarily, to detect any influence by the alcohol. So we can put here that there is no outward effect.

Now, I have placed the figure 10/100 of 1 percent in the column next in order. And from 5 to 10/100 of 1 percent is found, by testing a large group of people, that slightly above 5/100 of 1 percent we have found that people are beginning to be affected so it can be tested outwardly, and by the time it gets above 10/100 of 1 percent, that almost all people tested show some definite outward, measurable effect. And these things are as follows:

Reaction of eyes to light.

Second; there are possible behavior changes and these changes are very variable, depending upon the person.

The third thing is visual acuity, the ability to see well, and this refers particularly to a person's peripheral vision, the ability to look straight ahead and observe things almost 90 degrees to the line of vision, and observe—consciousness of what is going on out at the side of the vision. That circle of vision narrows considerably

[fol. 38] with increased blood levels, and can be tested, and is found that by the time the blood level gets to 10, there is this loss of ability in all people.

The fourth thing is reaction time. Reaction time is the time that it takes to respond to any situation in observing either something with the eyes, or responding to hearing a sound, or responding to a touch, or completing some act to the rest of the body. Reaction time is slowed in all cases when the blood level is as high as 10/100 of 1 percent.

The next thing is manual dexterity. The manual dexterity is the ability to manipulate things with the hands, arms, fingers, in coordination with the other parts of the body, and in connection with the mind, and after 10/100 of 1 percent there is a certain loss of ability, and a certain amount of clumsiness develops, and this can be measured with tests.

Now, these five points I have stated are always at effect at a blood level of 10/100 of 1 percent, and that is regardless of age, physical condition, or anything else. These can be aggravated by other defects, but this is not the same as intoxication, and I would like to make a distinction between what I refer to as alcoholic influence and intoxication. Now, these things can be present without having any loss of speech, or walking ability. To the ordinary person they are not easily detectable unless he applies [fol. 39] tests, or unless he knows something about the person's ordinary behavior. Walking or talking stages are the more advanced stages of alcoholism I refer to as being intoxication, or drunkenness. Now, walking or talking losses can begin in some people even at this range. They can occur in other people not until higher levels of alcohol is present. On the average we find that a person is, what I would call, intoxicated, at about 15/100 of 1 percent, and I have seen a few cases go as high as 24 before there was a very obvious loss of walking and speech ability. I have never seen anyone go higher than 24, or do I know of anyone tested by another person, or in a broad program. So I think it is safe for me to say that after 24/100 of 1 percent there is always obvious intoxication, meaning, walking and talking losses.

Now, between this advance stage and the death stage

there is an area of blood alcohol level in which we find unconsciousness, the tendency to go to sleep, no desire to stay awake, enough brain depression where we approach the sleep stage. This can occur at a great variety of different blood levels, and the fact that it is helped by fatigue and other factors. If we find that anywhere from 30 to 32 on up, that would be common. On the other hand, many people are able to go to 35 and 36 without having any automatic passing out, so that this is quite a variable stage, and I will put that entire range as the tendency toward coma, and that is about the extent of the generalizations that can be made from the results [fol. 40] of our work.

By Mr. Feeley:

Q. Just a couple of questions while you are there. Would a person's drinking make any difference, whether they were a light or heavy drinker?

A. That is accounted for by the fact we have ranges where these occur and not any one range. Not any two people are the same, exactly, and drinking habits do come into the picture; and we find that heavy drinkers have enough habituation to the alcohol that these don't occur until .08 or .09 in this case. Whereas persons without drinking habits are affected at .05. So we do have tolerances.

Q. At .10, is everybody under the influence when drinking to that figure?

A. Yes, that is my experience.

Q. And everyone is drunk at .24?

A. Yes.

Q. Could you translate those percentages into the amount of alcohol actually present in the system?

A. That is simply a matter of arithmetic. I said all the alcohol present is distributed throughout the water of the body. In a human being, taking a 150-pound man as the standard, there are about 2,000 ounces of water in the body, so this amount of alcohol is mixed in like alcohol in a barrel of water, and you will find, if you will multiply .05 percent times 2,000, that the answer to that multiplication problem is one ounce. So if I put another column [fol. 41] here, and I put "Ounces of alcohol," pure alcohol,

I find that I calculate one pure ounce of alcohol present at .05 percent, then there would be two at 10, and three at 15, and 4 at 24, or 25, and so on.

Q. All right. Now, with reference to 100 proof whisky, what would that be?

A. Well, we can put another column here entitled, "100 proof whisky," and by definition 100 proof whisky is whisky which is half alcohol. So if we have present one ounce of pure alcohol, it would then require two ounces of pure whisky to be present in order to make one ounce of pure alcohol. So I put the two opposite .05, and the figure 4 opposite .10, and the figure 6 opposite .15, and the figure 8 after .24.

Q. Then, that would indicate at the time this blood was taken there was at least 8 ounces of 100 proof whisky in the system?

A. That isn't exactly the inference. The actual fact of it is that at the time the blood test was made there is alcohol present to the extent of 4 ounces, and that is the amount of alcohol in 8 ounces of whisky. That doesn't indicate what the total amount was that was consumed, because the body does eliminate alcohol, and any amount over this could have been consumed according to the time of the drinking, so the only thing that can be said is, it is the amount at the time of the test.

Q. Now, one more question. If a person has been eat- [fol. 42] ing—if a person has had his dinner, say, while drinking, would that make any difference?

A. It wouldn't affect this table. It does affect the rate at which the alcohol is absorbed and the time it takes to reach the levels, and the amount taken to reach these levels, but once the level has been reached, the effects I have outlined in the table would not be altered.

Q. In other words, what I am asking, Mr. Bradford, is, if a person is eating and drinking, he can generally hold more?

A. He can usually drink more without achieving more blood level.

Q. Is that because it is metabolized?

A. It is because it is mixed up with the food and the food interferes with the contact of the alcohol with the digestive wall, and must pass through the digestive wall

in order to get with the blood. So if there is any mechanical obstruction, it takes longer to break down in the stomach, and it never gets into the blood.

Q. Is there any other way for the alcohol to get to the blood?

A. No simple way; there are some obscure ways.

Q. Other than by injection, or something like that?

A. Yes.

Mr. Feeley: I have no other questions, Your Honor.

The Court: You may examine, Mr. DiMaria.

Mr. DiMaria: Your Honor, I have a full three minutes. [fol. 43] May I suggest Mr. Bradford come back after his trial in this other court, if that is possible? I mean, I don't wish to take the jurors' lunch time to cross examine, which may take at least 15 minutes.

The Court: Are you willing to forego 15 minutes of your lunch hour?

A Juror: Yes, sir.

Mr. DiMaria: I don't agree to limit myself to 15 minutes, but I will certainly try.

Cross-examination.

Mr. DiMaria: If I may, Your Honor, I would like to put a chart here to the same effect as Mr. Bradford has put down. It is a chart by the Committee on National Safety from the National Safety Council.

Mr. Feeley: You can ask Mr. Bradford if he is acquainted with it, Mr. DiMaria, unless you are an expert. The law requires you show him what you are referring to beforehand.

Mr. DiMaria: I am referring to a footnote in the case of Lawrence versus City of Los Angeles, 53 Cal. 2nd, at page 9. It is a chart made by the Committee on Tests for Intoxication for the National Safety Council.

By Mr. DiMaria:

Q. Do you know about that?

A. Yes, I am well acquainted with it.

Q. And is it reputable?

A. As far as it goes, yes.

[fol. 44] Mr. DiMaria: All right. My writing isn't as good as Mr. Bradford's, but if there is any question, I will be glad to interpret it.

By Mr. DiMaria:

Q. All right. I would like to show you this chart, if you wish, Mr. Bradford, so that you can compare it with the blackboard.

Now, this chart differs a little from your chart. What would you say to the statement of the Committee that, .15 to .20, for instance, is dizzy and delirious?

A. I would say that is quite consistent. I have seen a good number of people in that condition in that particular range.

Q. What would you say to .20 to .30, that he is dazed and dejected?

A. I would say that is true, too. I have seen people in that condition in that range.

Q. Generally speaking?

A. I have actually seen it. I think it is true.

Q. It is true, generally. We are not speaking of isolated examples; isn't that correct?

A. I think when you find a person dazed and dejected in that range that is quite consistent.

Q. How about .30 to .40, dead drunk?

A. I would say also that is consistent.

Q. That is true, generally?

A. That is right.

Q. .40 to .50, he is dead?

[fol. 45] A. I have seen some people in the 4 to 5 range who were not dead, but if they were, I think it would be consistent.

Q. Would you say, then, that .15 to .20, dizzy and delirious, is consistent with this chart here?

A. Yes, I would.

Q. Now, you have made statements that there are some individuals who up to .24 are not intoxicated, right?

A. Yes, that is right.

Q. But .24 is the magic dividing line. Everyone above .24 is intoxicated. That was your statement, wasn't it?

A. I have stated I have never known of anyone above that who is not.

Q. But you have known people under that?

A. One or two, at .23, .24.

Q. Actually at .24 you have known of cases where he has not been intoxicated?

A. One, yes.

Q. Yes. Now, this chart speaks of .15 as being 6 to 7 ounces of whisky, .15, you have that there?

A. Yes.

Q. Is that right?

A. Yes, I have 6 there, yes.

Q. You have 6?

A. Yes.

Q. All right. Now, how long does it take, approximately, for a person to lose an ounce of whisky in his system? How long does it take for his system to use it up?

A. The rate of elimination is such that the blood level [fol. 46] tests, if taken an hour apart, assuming, of course, that all the alcohol has been absorbed that is going to be absorbed, and the body throws it off, and if the test were made at one time and an hour later on the test taken, the blood level is ordinarily .02 percent lower at the end of the hour than it was in the beginning, in terms of ounces. That would depend on the size of the person, you see, because it is a percentage thing.

Q. Well, .02 percent, then, would be roughly one drink per hour, wouldn't it?

A. Well, yes.

Q. .05 is two drinks?

A. That is the elimination of a 150-pound man at about an ounce of 100 proof whisky; that is right.

Q. Now, also when there is a measurement of .24, let us say, for example, showing eight ounces of whisky, that is not all of the whisky that is in the system, is it?

A. Well, it is not any of the whisky; it is alcohol.

Q. Excuse me. That is not all the alcohol in the system, is it?

A. It isn't a quantitative amount, it is a percentage amount, and if you wanted to find out how much alcohol is in the body it would be necessary to multiply the percentage

times the water body volume, which is what I have already described.

Q. Well, isn't it true that 100 percent of the whisky [fol. 47] consumed is not yet into the body—content of the body?

A. Yes, I mentioned that. It doesn't always get out of the stomach.

Q. So that when you took eight ounces of whisky, I presume that is what you would call it instead of 4 ounces of pure alcohol, 8 ounces of whisky, it is necessarily true, then, that the individual whose blood has been tested at that rate, .24, has had more than 8 ounces of whisky to drink; isn't that right?

A. That is right, yes.

Q. Can you tell us approximately how much more?

A. There isn't any way to do that; it depends on the time. In other words, a week ago a person could have consumed a large amount of alcohol that was all eliminated, and likewise, even within a 24-hour period there is a lot of alcohol already eliminated, so you can't go by the time the test was made; it is merely speculation.

Q. Well, let's say over a 4-hour period, for example, from the time a person first starts to drink until the time the test is taken. If his blood content, alcohol, is .24, showing 8 ounces of whisky, how much would he have had to drink in general cases, the average case?

A. I don't know. There isn't any way I can generalize. I think the only thing you can take from a test is, take what is there and the rest of it is mere speculation.

Q. Well, we have stated that if he drinks continuously, that each hour he loses about one ounce of whisky. So if, [fol. 48] at the time of the test, it shows 8 ounces of whisky, 4 hours having passed, he would have had to have at least 12 ounces of whisky, wouldn't he?

A. You can set that up as a minimum, yes.

Q. At the very least?

A. Yes.

Q. In your experience as an expert in these things, do you know what the average drink—how many ounces of whisky the average drink contains?

A. The law requires that a jigger is 7/8 of an ounce, but that doesn't necessarily mean that that is what was poured.

Q. So the average drink is about 7/8 of an ounce; is that right?

A. Yes.

Q. Now, you have stated that many cases can go to as high as 35 to 36 without passing out?

A. I have seen them, yes.

Q. Many cases, you have stated?

A. I have seen them, yes.

Q. Yes. Many cases. You wouldn't say that is consistent with the chart of the National Committee on Intoxication, would you, where it says .30 to .40, that is dead drunk?

A. I would say that is consistent, yes.

Q. Perhaps we have a different definition of passing out, then. Dead drunk. In what way would you say it is consistent?

A. To me the impression of dead drunk is anyone that might be passed out, or near it, or unable to talk, or walk [fol. 49] with difficulty; and that includes a wide range, at least in connotations I am used to.

Q. Now, at .24, would you say that there was an obvious loss of walking ability?

A. I would say that that is right, yes.

Q. And reaction of the eyes to light?

A. There would always be a noticeable reaction, yes.

Q. When you say visual acuity, what do you mean by that?

A. I mean principally peripheral vision, side vision.

Q. You wouldn't mean seeing double or anything at .24?

A. It could, but it isn't common.

Q. What do you mean by manual dexterity now, handling writing, or what?

A. I mean facilities with the body extremities in connection with thinking. The loss of manual dexterity is the development of a certain amount of clumsiness.

Q. In a .24 there would be an obvious loss of manual dexterity; isn't there?

A. Yes.

Q. And at that point, .24, there would be an obvious change, wouldn't there, in his behavior?

A. I would expect it, yes.

Q. It would be quite obvious to anyone, that he was under the influence of alcohol, wouldn't it, at .24?

A. It should be.

Q. Yes. In practically all those connections isn't that true?

A. That is right.

[fol. 50] Q. All of the various elements you have put up there?

A. Yes.

Q. Now, were you present when the blood test was taken?

A. I believe not.

Q. Were you present when Mr. Walton was there that evening?

A. No, I don't think I was.

Q. In other words, you know nothing of what transpired?

A. No.

Q. But you do know that the blood test was taken on May 8, 1953, the evening—the records show that, don't they?

A. The records show that.

Q. And when was the analysis made, what date?

A. The analysis was made on May 12, 1953.

Q. Do you have a record of that?

A. I have made an extract of the laboratory record on that point before I came, and I checked it against what appears on the envelope in evidence there, and it is the same.

Q. This sample was taken May 8, wasn't it?

A. That is what the envelope shows.

Q. Yes. And it wasn't until May 12 that anything was done with respect to it; is that correct?

A. There was no analysis until then.

Q. There was no analysis until then?

A. That is right.

Q. Now, you did not take this test yourself, did you; the analysis?

[fol. 51] A. The chemical part, my records don't indicate, and I don't remember. I could have, or it might have been my assistant, I don't remember.

Q. You have only one assistant; do you?
A. That makes blood tests; yes.
Q. Do you do it sometimes?
A. He and I do it interchangeably at this time.
Q. And you don't know which did it this time?
A. No, my records don't show.

Mr. DiMaria: At this time, Your Honor, I would like to make a motion that all evidence relating to the blood test be stricken from the record.

The Court: The motion is denied.

Mr. DiMaria: As hearsay.

The Court: You have a half a minute, Mr. DiMaria; if you can't finish within that half a minute, I am not going to compel the jury to wait any longer, we will adjourn for lunch.

Mr. DiMaria: I have no other questions, Your Honor.

Mr. Feeley: Just a moment, Your Honor. From Mr. DiMaria's book here, it says here it appears to the medical when the blood alcohol concentrate of the driver of an automobile is .15, such fact is conclusive evidence that the driver is under the influence of alcohol. Is that your understanding of the medical profession's viewpoint?

[fol. 52] The Witness: Yes.

The Court: All right. We will adjourn now until a quarter to 2:00.

(Whereupon, at 12:30 o'clock p.m. a recess was taken until 1:45 o'clock p.m., this day.)

[fol. 53] AFTERNOON SESSION, 1:45 P.M.

(Pursuant to recess, Court convened and the following proceedings were had:)

The Court: Are you ready to proceed, gentlemen?

Mr. DiMaria: Ready for the Defendant.

Mr. Feeley: Yes, Your Honor.

The Court: Let the record show that the jury is present and the Defendant and counsel.

Officer Shannon, will you please take the stand? Were you finished with your examination, Mr. Feeley?

Mr. Feeley: Yes, Your Honor.

The Court: All right.

Mr. DiMaria, you may cross examine.

CLIFTON OWEN SHANNON, recalled as a witness on behalf of the People, having been previously duly sworn, was examined and testified further as follows:

Cross-examination.

By Mr. DiMaria:

Q. Now, Mr. Shannon, on the evening of May 8, you stated that approximately 10:00 o'clock you were chasing Mr. Walton in your police car?

A. Yes, sir.

Q. Were you driving?

A. I was.

Q. And you stated you went up to 65 miles per hour, did you, while you were chasing him?

[fol. 54] A. We clocked him at 65.

Q. Did you clock him at 65 personally?

A. I glanced down at the speedometer and Office Daly also looked at it.

Q. Now, was that on an even speed, or were you accelerating, were you still chasing him?

A. No, this was when we had broken out of this jam we were in and we were in the outside lane and we were only about 100 feet behind Mr. Walton's car. We had a good clock on him, a steady speed.

Q. And you had your siren on all the time and the lights flashing on and off?

A. Yes. Never did touch them.

Q. And Mr. Walton refused to heed those, did he?

A. I won't say he refused to heed them.

Q. Did he do anything about it?

A. He did, after we had gone that half a mile or so. Yes, sir.

Q. So then you stopped him about half a mile from L'Omelette?

A. No, it was about a half a mile from Ferranti intersection there at that curve that I drew on the board.

Q. How far is L'Omelette from Ferranti's intersection?

A. I would say 500 feet, about a tenth of a mile, roughly.

Q. So it took you all that time to bring him to a stop. I imagine you put on your siren immediately, after he came out of L'Omelette you started to chase him?

[fol. 55] A. When we approached the traffic island at Ferranti's is when we definitely started out to get him.

Q. When you got 100 feet behind him is when you——

A. We didn't get 100 feet behind him at first; we were behind—that is when I had to pass the double line.

Q. There were cars in front of you then, weren't there?

A. Yes, sir.

Q. And yet you saw everything that Mr. Walton did in his car; didn't you?

A. Not while I was trying to break out in the open, I didn't see everything he did.

Q. Did you see him brush the island?

A. That was before we started out after him.

Q. You hadn't started out after him when you reached the island?

A. What I mean, we hadn't passed the double line or got behind him to clock him or pull him over. We were trying to break out in the open then and when he broke out in front of the car in front of us and brushed the island the way he did—and brushed the island, convinced us that we had better stop that fellow.

Q. When you say "brush the island," what do you mean?

A. He went over toward the center part of the island. There are some chatter bars and concrete island for left turns.

Q. And what did he do with respect to that?

A. What did he do?

[fol. 56] Q. Yes, when you say brushed them, what did he do, run over them?

A. No, he just went up against it with the left side of his tires.

Q. Do you know if the tires touched them or not?

A. I don't know. I mean, he ricocheted a little bit.

Q. Just a little bit?

A. That is it, just a little.

Q. Didn't you say he ricocheted into the other lane?

A. I don't know whether he ricocheted or turned into the N-1 lane or not.

Q. Then you don't know whether it is a ricochet or not?

A. All I know is he ricocheted on the traffic island and ended up in the N-1 lane.

Q. By "ricochet," what do you mean?

A. He brushed up against it just as you go into a curb too hard and ricochet back from it.

Q. By "ricochet" do you mean just turn away from it?

A. That is it, more or less of a bounce or momentum of your impact of brushing it.

Q. But you don't know whether he actually touched the island or not, do you?

A. Well, in my opinion I would say he did.

Q. What did you see—let me ask you what you saw?

A. I had a lot to look at at that particular moment.

Q. I imagine so. You don't know, do you, whether he [fol. 57] touched the island?

A. All I know, there was a violent change of direction to his automobile.

Q. You don't know whether that was by design or otherwise, do you?

A. Not definitely, no.

Q. So you don't quite mean ricochet, do you?

A. (No response.)

Q. Now, you then brought Mr. Walton to a stop?

A. Yes.

Q. And how did you do that?

A. Well, we were behind him, as I said before, about 100 feet in the last half of that straightaway, and the red lights were still on, of course, flashing, and so was the siren.

Q. So he came to a stop voluntarily, correct?

A. I assumed he did, he stopped.

Q. And where did you park, behind him?

A. I parked over to the left and rear of his vehicle.

Q. I see. But to the rear of his vehicle—you were behind his vehicle?

A. Yes, to the left and to the rear, yes, sir.

Q. Then tell us what happened?

A. Well, as I stated this morning, Officer Daly got out of the patrol car on the right side, and of course I had to get out on the left side, and I went around the rear of the patrol car, and Officer Daly had taken the keys out of the [fol. 58] car and was talking to Mr. Walton.

Q. Now, at that time what was the first thing that you heard said there?

A. I wouldn't be able to remember the first thing I heard.

Q. Well, what do you remember, the conversation?

A. Well, I can only remember the gist of the conversation. It was 11 months ago and it was, "What was the idea of driving like that?" and how much had he had to drink, and so on, and also I remember he asked him to step to the rear of his car and get away from between the two cars.

Q. Now, you stated that Mr. Walton leaned on the vehicle; is that correct?

A. Yes, he did. In talking to us he seemed to want to lean against the patrol car.

Q. He leaned against his car, didn't he?

A. No, our car.

Q. Was he made to take any tests there?

A. We observed him walking.

Q. Did you ask him to—did you have him do that as a test?

A. Yes, sir. Officer Daly asked him to, and we observed him walking, but as I remember, he either refused or wouldn't take any other test on the shoulder.

Q. Did he take a walking test?

A. We observed him walking from his car to the rear, to our car. And Officer Daly did have him walk over to that [fol. 59] real estate building I mentioned.

Q. As a test?

A. To observe his walking, yes, sir.

Q. Yes, under direction?

A. Yes. Officer Daly asked him.

Q. And was there any other test requested of him?

A. I recall Officer Daly shining his flashlight in Mr. Walton's face to note the pupil reaction, I assumed.

Q. Any other tests?

A. I don't recall any at the scene.

Q. Any requests for Mr. Walton to close his eyes?

A. I don't remember that either.

Q. You don't remember anything like that?

A. No.

Q. Then you took Mr. Walton to San Jose; is that correct?

A. Yes.

Q. To the Sheriff's Office there?

A. No. We first took him to the San Jose Police Department AIB, the Accident Investigation Bureau.

Q. And where is that?

A. That is on South Market Street, right directly across from the City Hall.

Q. And then what happened there?

A. We went into the examination room and Mr. Hamre, the technician, was awaiting our arrival.

Q. Now, during this time on the way up to San Jose, did [fol. 60] Mr. Walton refuse to answer your questions?

A. Well, we asked him several questions and he seemed reluctant to give us any definite answers. I mean, it took a long time before we found his name.

Q. You say "reluctant." Did he refuse to?

A. I wouldn't say he refused to; he didn't come right out and say, "I absolutely refuse to answer your questions." He didn't say that.

Q. But you didn't get any answers from him, did you?

A. We had a hard time getting any definite answers from him as to his first, middle and last names. Officer Daly tried to tie in his identity with the credentials he had on his person, such as the Florida license and the British license.

Q. Did Mr. Walton, on the way to San Jose, make any statement such as, "No comment"?

A. I don't recall any "No comments" on the way into AIB.

Q. You don't?

A. I don't recall any, no, sir.

Q. But he did refuse to take any tests at the scene of the arrest; right?

A. I don't remember whether he refused or not. You mean up here at Fernando and El Camino?

Q. Yes.

A. I don't remember any refusal there.

Q. You don't remember his refusal, and you don't re-
[fol. 61] member his taking any test?

A. I remember he did observe Officer Daly's request to walk over toward the building.

Q. That is all you do remember?

A. That is eleven months ago.

Q. Did you call it the AIB?

A. AIB, yes, sir.

Q. The Accident what?

A. Accident Investigation Bureau.

Q. At that room in the Bureau where Mr. Walton was taken, what was done there?

A. Well, Officer Daly had him sit down in a chair alongside a desk, and then Officer Daly started filling out District Attorney's Sobriety Report, which is a form such as I used this morning, and asking questions and so on.

Q. Now, did Mr. Walton answer those questions?

A. As I recall, he started out by answering the questions, he answered the first two.

Q. And what were those?

A. Well, the first question is, "Were you——"

Q. I am asking you if you remember?

A. Well, ——

Q. I don't want you to read from the report.

Mr. Feeley: Do you need your notes to remember?

The Witness: No, I don't. Officer Daly asked him if he was operating a motor vehicle. He answered, "Yes." Officer Daly asked him, "From where were you coming?" [fol. 62] Mr. Walton said, "Stanford." And "Where were you going?" That is all in the first two questions, "Where were you coming?" and "Where were you going?", the answers "Stanford" and "home."

Q. Were more questions asked of him?

A. Several on this list.

Q. What was Mr. Walton's response?

A. No comment.

Q. He refused to cooperate completely in answering questions?

A. That is right.

Q. Were there any physical tests requested of Mr. Walton at that time?

A. Yes, Officer Daly asked him to perform equilibrium tests.

Q. What did Mr. Walton say to that?

A. He refused to cooperate.

Q. Did he ask him to perform any coordination test?

A. That is what I mean by equilibrium tests.

Q. Were there any other tests he requested him to perform?

A. Officer Daly asked him if he would submit to having a sample of his blood taken for a blood alcohol.

Q. What did Mr. Walton say to that?

A. Well, at first he raised his right sleeve as though he were going to do it, and then he stopped. He says, "I don't want to."

Q. Then what happened?

[fol. 63] A. Well, Officer Daly kept asking him why he didn't want a test performed and I don't know Mr. Walton's exact words, but the gist of it was that he didn't. And then finally he had rolled his sleeve back up again and then he had refused again. It went on three or four times and eventually he stuck his arm out and says, "Well, take it."

Q. Now, up to that time Mr. Walton had been quite belligerent throughout?

A. He had been quite uncooperative and one might say a little belligerent, yes.

Q. After the blood test was taken, was Mr. Walton requested by anyone to take any other test?

A. No, sir.

Q. He wasn't requested to do any walking?

A. No, Officer Daly asked him that before and he had refused so—and Officer Daly had already noted he had refused, so he didn't try it any more.

Q. Was Mr. Walton cooperative after the blood test was taken?

A. There was very little to do in the AIB after that, except to leave the office.

Q. Was he still belligerent?

A. Well, as I say, when we picked up our gear to leave the AIB, there was only one thing left to do, and that is to walk out the front door, and he followed us, went with us.

Q. Walked by himself?

[fol. 64] A. Yes, sir, with assistance.

Q. Now, Mr. Shannon, isn't it true that at all times Mr. Walton protested the taking of a blood sample?

A. Not at all times; he seemed to lean toward it for a while, then he would suddenly get an idea he wanted to see somebody or other—I forgot who he said he wanted to see. Then we would still talk to him, then he would roll his sleeve up and stick his arm out, and then he would refuse again. I don't know what his idea was.

Q. Isn't it true, Mr. Shannon, that he was forced to take a blood test?

A. He was not forced to take it.

Q. Isn't it also true that he was requested to take additional tests after the blood test was taken and he refused to do that?

A. What kind of tests?

Q. I'm asking you.

A. Well, I don't recall any more tests he was ordered to take, or even asked to take.

Q. May I see these notes, Mr. Shannon, that you have referred to to refresh your memory? You would say that his attitude at the AIB was uncooperative, wouldn't you, throughout?

A. I would say so, yes, sir.

Q. Throughout, from beginning to end, so far as you know?

A. My impression is that it was very uncooperative.

[fol. 65] Q. Yes. Did Mr. Walton ask to see his attorney at those proceedings?

A. He asked to see someone—I can't remember whether it was his doctor when it came to taking the blood sample, or whether it was his attorney. I know he was asking to see somebody. I was under the impression it was to see his doctor.

Q. And that request was denied him, was it?

A. It was at the time, at the AIB, yes, sir.

Q. Yes. It was denied him at the AIB. You refused to allow him to get to a phone to call his attorney; is that right?

A. I don't think he insisted on actually phoning somebody. He just merely said, "I would like to see——" whoever it was, either a doctor or a lawyer, but he said, "I would like to talk to——" somebody.

Q. And that was not permitted him; is that correct?

A. No, sir.

Q. Now, at the AIB he refused to walk a chalk line; is that correct?

A. That is one of the equilibrium tests I mentioned.

Q. And he refused to perform the finger-to-nose test?

A. That is part of it.

Q. He refused to stand with his feet together, his eyes closed and his head tilted back; is that correct, the Rhomberg test?

A. Yes, sir.

Q. No. 1, and he refused to perform the Rhomberg test [fol. 66] No. 2; is that correct?

A. Yes, sir.

Q. Now, at any of this time that you observed Mr. Walton that night of May 8, 1953, would you say that he was dizzy?

A. He was unsteady on his feet.

Q. Let me give you a definition, Webster's definition of dizzy: "Mentally confused or unsteady." Would you say he was mentally confused?

A. Well, we didn't get enough factual information from him to judge by that.

Q. You don't know that, do you?

A. We couldn't get anything out of him.

Q. Would you say he was delirious? And by that I will define that, having a delirium is raving, frenzied. Would you say he was delirious?

A. Not according to that definition.

Q. Not according to Webster's definition?

A. No.

Q. Now, would you say that he was dazed in the sense that he was stunned or stupefied?

A. You mean as though he had a blow on the head, or something like that?

Q. Yes, dazed.

A. He wasn't dazed in that sense, no.

Q. Would you say that he was dejected?

A. No, he seemed to be starting out in a very, I would say, hilarious or humorous vein.

[fol. 67] Q. But by the time you had reached San Jose he was belligerent; right?

A. You can be belligerent and still be hilarious, I am under that impression.

Q. And uncooperative?

A. He can still be humorous, hilarious, and uncooperative.

Q. Mr. Shannon, can you tell me why this ticket for violation of 502, 510, 511, speeding, was not handed to Mr. Walton at the scene of the accident?

A. It is just our operating procedure, that is all I know.

Q. You haul him into jail without giving him a ticket; is that your operating procedure?

A. It is our operating procedure that if we are going to book a 502 we go through the steps which I have just stated. We go into the AIB and give him an examination, take a blood sample if available, and then we take him down to the County Jail. And while the jailer is booking, then the arresting officer writes the citation. It has been done that way the six and a half years I have been in this county.

Q. After you left the AIB, did you take Mr. Walton to the County Jail?

A. In those days it was required by the District Attorney, or the Sheriff's Office, that we take the prisoner across the street and have him fingerprinted and photographed.

Q. And you did that to Mr. Walton?

A. Yes, sir.

[fol. 68] Q. And do you know if he was put in jail, incarcerated for purposes of imprisonment, not for purposes of taking his fingerprints?

A. I beg your pardon, I didn't get that.

Q. Was Mr. Walton actually incarcerated in a cell?

A. At which place?

Q. At the County Jail after the AIB procedure?

A. Well, yes, after it was all over he was.

Q. You put him in jail, in a cell?

A. We turned him over to the Booking Sergeant in the County Jail, and I assumed he did it.

Q. To be jailed?

A. I assume so. He was booked.

Q. Do you know how much time he spent in a cell?

A. No, sir.

Q. You don't know whether he was let out of the cell before you left the building?

A. I have no idea, sir.

Q. At that time did he still demand that he be permitted to call his attorney?

A. I don't recall him asking after we left the AIB.

Q. But you do know that he was not permitted, during the time he was at the AIB, to call an attorney; is that correct?

A. At the AIB the procedure is not to, yes.

Q. So he was not permitted there, and during the time that—before he was actually booked, handed over to the [fol. 69] jailer from your custody, do you know whether he was permitted to call an attorney?

A. All calls have to be made at the County Jail after we turned him over to the Booking Sergeant, and what happens after that is entirely in the Sheriff's hands. All we do is book him there, and the minute he is turned over, physically, into custody, we leave.

Q. And that is all you know of this case; is that correct?

A. Well, no. I was called in to Palo Alto some time ago on a trial.

Q. Well, I object to anything that happened after this.

A. Well, that is this case. I thought you asked me a leading question.

Q. I mean what you saw; not what you heard.

A. Well, I——

Q. What you saw the evening of May 8th.

A. No, I observed Mr. Walton walking from the AIB office to the front door, and very unsteady on his feet. In fact, we had to support him and he lurched and fell against

the water cooler, and we had to grab that before it hit the floor.

Q. Before he hit the floor?

A. Before it hit the floor.

Q. Oh, so he was walking with a definite lurch; was he?

A. Definitely.

Q. And what time was this?

A. It was after we had finished our examination at AIB. [fol. 70] I would say around 11:00 o'clock at night.

Q. Around 11:00 o'clock?

A. Yes, sir.

Q. And you had to help him walk?

A. We had him by the elbow to lead him out the front door.

Q. I mean, that was necessary that you steady him so he could walk; did you say that?

A. I don't know whether it was necessary and it turned out later we were justified when he went up against the water cooler.

Q. Then it was necessary?

A. Yes, sir.

Q. In other words, he couldn't walk by himself without staggering?

A. No, he staggered quite a lot.

Q. You had to help him walk—you on one side and somebody else on the other side?

A. No, I was assisting him. Officer Daly was in front.

Q. So you were the only one helping him walk?

A. The corridor is too narrow for three people abreast.

Q. At any time before you reached the jail did you let him go or did you help him, assist him to walk all the way?

A. I don't remember whether at the time we had physical contact with him all the way across to the booking office or not. I don't recall that, but I do recall the incident in the hallway of the AIB.

Q. Are there steps down from the AIB room when you left, down to the floor level?

[fol. 71] A. No, the office at the AIB is in the back of the Accident Investigation Bureau. There is a corridor about 70 feet or 80 feet long out to the front door onto Market

Street. It is all ground level, only one step from the door down to the sidewalk, that is all.

Q. Now, let me ask you a question, Mr. Shannon; isn't it true that law enforcement officers single out drivers of sports cars for special attention while on the road?

A. Did you put that in plural, law enforcement agencies?

Q. Officers?

A. Officers.

Q. Yes, driving on the road, such as yourself?

A. I can only speak for my department, sir. Do you want an answer to that?

Q. Well, how about you and Mr. Daly, for instance?

A. We have no orders written or verbal to the effect that we are to stress enforcement on any one make model of vehicle. Officer Daly and I have never concentrated upon sports car enforcement. As a matter of fact, I can only remember citing one sports car driver, a speeding citation, that was an MG. That was the only one I ever did cite.

Q. Well, then, would you say that the sports car drivers are generally careful drivers?

A. As I have said, I have only had recourse to cite one, and that was an MG.

Mr. DiMaria: I have no further questions.

Redirect examination.

[fol. 72] By Mr. Feeley:

Q. Did Mr. Walton ever use the expression, "You amuse me"?

A. That sounds familiar. As I say, he was kind of humorous on the trip in.

Q. Do you recall how that expression was used, or when?

A. Well, it came in connection with my trying to find out where he got his British accent, and I remember asking him if he picked it up at Harvard or Yale. I don't know why I chose those two Universities, but he was laughing that peculiar laugh of his and that is when he stated, "You amuse me." Also along that same time he said he had always liked the California Highway Patrol boys,

he thought they were pretty good, but he was going to revise his opinion.

Q. All right. Now, you related at one time that he was repetitious, that he repeated statements?

A. Yes, he was.

Q. Was there anything in particular that he repeated?

A. Well, he repeated that last, and he repeated, "You amuse me," then, of course, he repeated "No comment," several times, and I believe he had another word, "Continuously" or something. He repeated the word "Continuously"—I don't remember in what connection he was using it.

Mr. Feeley: I have no other questions, Your Honor. And I offer this in evidence.

Mr. DiMaria: I object to that as hearsay.

The Court: The objection will be overruled, you asked [fol. 73] most of the questions about it.

(Whereupon, the above-mentioned document, being an alcoholic report form, was marked People's Exhibit No. 2 for identification.)

Mr. DiMaria: If I may ask one question of Mr. Shannon?

By Mr. DiMaria:

Q. Mr. Shannon, would you say that the repetitious answers were answers to repetitious questions?

A. No, we asked him several varieties of questions, but at first we did try to get his name and I would—you might call that repetitious, because we never got a definite answer.

Q. And to that you got the repetitious answers that you stated; right?

A. We didn't get definite answers.

Mr. DiMaria: That is all.

The Court: You may step down, Officer.

(Witness excused.)

HENRY N. HAMRE, called as a witness on behalf of the People, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Feeley:

Q. What is your full name, sir?
A. Henry N. Hamre.
Q. Is that H-a-m-r-e?
A. Right.
Q. And what is your occupation, sir?
A. I am a clinical laboratory technician.
[fol. 74] Q. Now, as a laboratory technician, are you licensed to take blood samples from human beings?
A. That is correct.
Q. Is that your principal activity, sir?
A. Yes, sir.
Q. For how long have you been licensed?
A. Since the licensing law went into effect, 1930 I would say.
Q. And I assume, then, that you have taken thousands of samples?
A. Yes, I have.
Q. Did you have occasion to take a sample from the Defendant here, Marvin Walton?
A. I did.
Q. And was that on the 8th of May, 1953?
A. Yes, sir.
Q. Referring you to People's Exhibit 1 for identification, does your signature appear thereon?
A. Yes, it does.
Q. Did you take this sample at that time?
A. I did.
Q. And what did you do with the sample, sir?
A. After the sample was taken and sealed in this envelope, I placed it in an ice box at the Accident Investigation Bureau.

Mr. Feeley: I will offer that in evidence at this time, Your Honor.
The Court: Any objections?

Mr. DiMaria: I object that its introduction into evidence is——

[fol. 75] The Court: Objection will be overruled, and it will be received.

(Whereupon, the above-mentioned document, previously marked People's Exhibit No. 1 for identification, was received in evidence.)

By Mr. Feeley:

Q. At that time, Mr. Hamre, well—at the Accident Bureau—that was at the Accident Bureau in San Jose?

A. Yes.

Q. Did you make any notes as to the condition of this Defendant, Mr. Walton?

A. Yes, I did. I made some notes at the time. I will read them.

"I was called at 10:20 p.m., arrived at the Accident Investigation Bureau at 10:40, and the blood sample was withdrawn at 10:55. I observed there was an odor of alcohol on the breath of subject. Face was flushed; clothes were slightly mussed; eyes bloodshot; pupils dilated; attitude very antagonistic; refused to go on with balance and coordination test."

Q. In your opinion, was Mr. Walton under the influence of liquor at the time?

A. I believe he was under the influence, yes.

Mr. Feeley: I have no other questions.

The Court: You may examine, Mr. DiMaria.

Cross-examination.

By Mr. DiMaria:

Q. Mr. Hamre, you state you were there 15 or 20 minutes prior to the time the blood test was taken?

[fol. 76] A. I was there during the questioning, yes.

Q. Was that when Mr. Walton first came in?

A. Yes.

Q. You were there, and was Mr. Walton requested to take coordination tests, and balancing tests, and so on?

A. Yes, he was.

Q. And he refused to do that?

A. That is right.

Q. And he was requested to take a blood test and he refused to do that; didn't he?

A. At first he did, yes, sir.

Q. At first?

A. Yes.

Q. And you stated that he did consent to taking the blood test after that?

A. He did consent to have his blood sample taken.

Q. Now, up to that time, his attitude had been quite belligerent, hadn't it?

A. Yes, it had.

Q. And he refused to answer any questions, too; isn't that true?

A. That is right.

Q. In fact, he refused to cooperate in any way?

A. Pretty much that way.

Q. Up until the blood test was taken?

A. Yes.

Q. Now, immediately after the taking of the blood test, wasn't he requested to take some other tests?

A. I don't remember that.

Q. And do you remember his refusing to take any of those other tests?

[fol. 77] A. We generally ask him to take the coordination test before I take the blood test.

Q. But if he refuses to take the coordination test before the blood test, would they ask him to take it after the blood test to see if he would cooperate?

A. It might be a possibility; I don't remember whether they did or not.

Q. Do you remember if his attitude was still belligerent after the blood test?

A. I don't, because I was busy packing my equipment.

Q. Now, during the time you saw Mr. Walton, he was sitting down all the time; wasn't he?

A. Yes.

Q. Except after the blood test?

A. Yes.

Q. Then he walked away; is that right?

A. That is right.

Q. And did you notice anything unusual about his manner of walking after he got up from the chair?

A. I don't think I observed his walking after; I was busy on the other side of the desk, packing my equipment.

Q. I see. And is there a water cooler in the room?

A. There is one in the corridor leading to the room.

Q. You weren't in the corridor, though?

A. No.

Q. How wide is this corridor, Mr. Hamre?

A. Oh, possibly three or four feet wide, I don't know.

Q. And how wide is the water cooler?

A. I have no idea.

[fol. 78] Q. Could you describe the cooler to us?

A. Ordinary water cooler that you see in every office, the drinking water cooler.

Q. Is it a type of cooler that you put five gallon bottles of water in?

A. That is right. Yes, that is right.

Q. I see. And that is placed right in the corridor; isn't it?

A. Placed right against the wall.

Q. Yes, but it is in the corridor, in this corridor you just described, three-foot corridor?

A. I am just guessing at the width.

Q. Has that—to your knowledge, has that water cooler been knocked down?

A. No.

Q. Do you know of anyone that has bumped into it?

A. Not personally, I don't know of anyone.

Q. Now, did you notice anything particularly different about Mr. Walton's speech while you were at the Bureau?

A. I don't believe I observed any.

Q. But he did talk there, didn't he?

A. He made some answers to some of the questions.

Q. You know, "No comment" at times?

A. I don't remember what they were.

Q. So there was nothing unusual about his speech, to your knowledge, right?

A. I didn't observe it.

Q. You noticed nothing unusual, but you did notice that [fol. 79] he was belligerent in his speech, didn't you?

A. Well, belligerent in his attitude.

Q. In his attitude?

A. Yes.

Q. But you noticed nothing unusual about his speech?

A. No.

Q. Now, when the bloodtest was taken, did Mr. Walton protest?

A. Not when the blood test was taken, no.

Q. But he did immediately before that?

A. He had refused a couple of times before he finally gave his consent to having it.

Q. Did any of the officers threaten him in any way about taking the blood test?

A. No.

Q. Did any of the officers hold his hand while the blood test was taken?

A. No, I don't believe so.

Q. You don't believe so?

A. I generally take the blood test myself. They generally put their arm on the desk because it is right there, and I take the blood test.

Q. Generally that is true. What about this time?

A. I don't remember the officers even touching him while I was taking the blood.

Q. You don't remember it?

A. No.

Q. Now, after the blood test was taken, he was still argumentative; wasn't he?

A. I don't remember. I think they left the office not too [fol. 80] long after the blood test was taken.

Q. I want to ask you a question as to whether you remember as to whether he refused to take the balancing and coordination test after the blood test was taken?

A. I couldn't say.

Q. You what?

A. I couldn't say.

Q. You don't remember now?

A. No.

Q. Do you remember testifying at the first trial that Mr. Walton did refuse to take the balancing and coordination test?

A. I don't remember.

Q. And that he was argumentative after the blood test was taken; do you remember anything about that?

A. No, I don't.

Q. Now, you saw Mr. Walton leave, didn't you?

A. Well, I saw him when he left. I didn't pay too much attention to it. I mean, I was on the other side of the desk.

Q. Yes. You don't remember now whether he walked with a stagger, lurch, or anything like that, do you?

A. No, I don't. I have no notes to that effect.

Q. If he had, would you have taken notes to that effect? You did take notes there as to the condition of his eyes and breath?

A. I made some observations, yes.

Q. If you had made those observations, would you have likely put them in your book?

A. I may have and may have not.

[fol. 81] Q. So, likely as not, he was not staggering?

A. I did not observe it.

Q. You did not observe it, but you did see him leave. May I look at this book, Mr. Hamre, the notes you referred to?

A. Yes.

Q. Now, you took the blood test, the actual drawing of the blood; is that correct?

A. That is right.

Q. And what did you do with the test sample?

A. The sample of blood is placed in the vial with an anti-coagulant in it to keep the blood from clotting. We label it with the man's name and the date and it is sealed in the envelope which was shown and placed in the ice box.

Q. I see. And that is all you know of it?

A. That is right.

Q. When you do that, your duties are finished?

A. I am finished, yes.

Q. So as to the actual alcoholic content of the blood, you have no knowledge?

A. I have nothing to do with that.

Mr. DiMaria: I have no further questions.

Mr. Feeley: That is all, Your Honor.

The Court: You may step down, Mr. Hamre.

(Witness excused.)

Mr. Feeley: Your Honor, I only had one more witness and that was Officer Daly, who is not here. His sister died last night, and there is testimony of the prior proceeding. [fol. 82] If counsel will stipulate, I will offer that.

Mr. DiMaria: In other words, you want the entire transcript of his testimony admitted in evidence?

Mr. Feeley: Yes.

The Court: If you want to take a little time to think that over, this might be an appropriate time to take a recess. We will recess for eight minutes. We will reconvene at a quarter of three.

(Whereupon, a short recess was taken, after which the following proceedings were had:)

The Court: Let the record show that the jury is all present and the Defendant and counsel. You may proceed.

Mr. Feeley: People rest, Your Honor.

Mr. DiMaria: I think there was an offer. I would like to object to introduction of the transcript of the previous trial, Your Honor, that was had in this matter.

The Court: Yes.

Mr. DiMaria: Because it is hearsay and improper. I would like to have Mr. Daly, if he is going to testify, under oath, and subject to cross examination, to be heard by the jurors. I don't think it is fair to my client without the opportunity to cross examine and have him placed under oath before this jury.

Mr. Feeley: Your Honor, you examined him before counsel and he was cross examined under oath before the Court—that part of it I can't see. But I am on the spot, [fol. 83] Your Honor. I can't have him here. If he doesn't want to stipulate, I can't introduce it.

The Court: All right.

Mr. DiMaria: Have you rested?

Mr. Feeley: People rest.

The Court: People rest.

Mr. DiMaria: Mr. Frelier.

PIERRE GUSTAVE FRELIER, called as a witness on behalf of the People, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. DiMaria:

Q. What is your full name, Mr. Frelier?
A. Pierre Gustave Frelier.
Q. And your address?
A. Residence, 1557 El Camino Real, Palo Alto.
Q. And what is your occupation?
A. Restaurant operator.
Q. And that restaurant is called?
A. L'Omelette, 4170 El Camino Real.
Q. In Palo Alto?
A. Yes.
Q. You know the Defendant here, Mr. Marvin Walton?
A. Very well.
Q. Did you have occasion to observe him the evening of May 8, 1953?
A. I waited on him all the time he was with us.
Q. I see. He was at L'Omelette that evening?
[fol. 84] A. That evening.
Q. About what time did he come in, Mr. Frelier?
A. Offhand, I would say fairly early. I remember him saying he would have one beer and go to the movies. How late that would be I don't know. It could not have been earlier than 5:00. On Friday we open at 5:00.
Q. So it was what time?
A. After 5:00.
Q. Shortly after 5:00?
A. Yes.
Q. Where did Mr. Walton sit?
A. Where he always does, on my side of the bar.
Q. You say he always sits on your side of the bar?
A. Always.
Q. Then you and Mr. Walton are personal friends?
A. Oh, yes.
Q. It is not merely a business matter?
A. Oh, no.
Q. Now, on the evening of May 8, 1953, would anyone

have served Mr. Walton any drinks at that bar other than you?

A. I am quite sure that none could have, because nobody comes to my side of the bar. I take that particular side of the bar and the bartenders do not cater to that side.

Q. In other words, that is your part and you brook no interference, nobody comes there?

A. Nobody, none of the waiters.

Q. And Mr. Walton sat there all the time, you remember?

A. All the time I kept an eye on him, yes.

[fol. 85] Q. Did he purchase—during that evening, did he purchase a meal at L'Omelette?

A. I do not recall; I do not recall; I do not recall.

Q. How many drinks, do you recall?

A. No. If he had had a regular dinner, he would have had to go to the dinner, and then I would know if he had eaten; if he was at the bar, he would have had just a sandwich, and that I would not remember.

Q. How many drinks do you remember serving him?

A. I remember giving him the original beer, then some friends came in, friends of his and friends of mine, and I do remember mixing some concoction for him called Alexanders. Alexanders, yes, creme de cocao and creme de menthe.

Q. And approximately how many drinks would you say he had during the evening, to your knowledge?

A. To my knowledge I would say between three or four, three or four; they are a mild drink. Creme de cocao is low proof; so is creme de menthe, and fresh cream.

Q. Now, did you observe Mr.—during all the time that Mr. Walton was there and you observed him, did he act in other than a normal manner?

A. He never acts normal; I have never seen him act normal.

Q. What do you mean by that, Mr. Frelier?

A. He is just happy, slap-happy, and he talks and hollers and makes a fool of himself generally. He wasn't any different from what he is generally.

[fol. 86] Q. But I am speaking with reference to whether he was under the influence of alcohol or not.

A. Definitely not; definitely not.

Q. You are willing to state under oath that he definitely was not under the influence?

A. To the best of my knowledge I would testify under oath that Marvin Walton was not under the influence of alcohol.

The Court: You are testifying under oath already, you understand that?

The Witness: That is exactly what I am doing.

The Court: I just wanted to be sure you appreciated that.

The Witness: I know.

By Mr. DiMaria:

Q. There was nothing unusual about his manner of speech?

A. No.

Q. His physical movements?

A. Same as ever.

Q. Same as ever. And you have seen Mr. Walton when he had had no alcohol at all to drink?

A. Oh, yes. I see him every morning at 9:00 o'clock.

Q. I see. Now, about what time do you remember Mr. Walton leaving L'Omelette, if you do?

A. I did not actually see him leave; I generally have my dinner about 10:00 o'clock, and by then I leave the bar, but I have no recollection as to whether he left before 10:00 or immediately after, I would not know.

[fol. 87] Q. And about what time, roughly, is your recollection of when you last noticed him in a state of what you say, "perfectly sober"?

A. All the time I was behind the bar, and I must have stayed there until 10:00 o'clock.

Q. At all times. Now, did you have occasion—after Mr. Walton left L'Omelette, did you have occasion to see him again that evening?

A. Well, I got a telephone call from San Jose. He was in the jail and he asked me to go and bail him out.

Q. That was that evening?

A. Same evening.

Q. About what time was it?

A. We were back about 2:00 o'clock. It must have been about 12:00 o'clock, about midnight when we got the call, between 11:30 and midnight I could vouch for that.

Q. And you went to the San Jose County Jail?

A. Went to the San Jose County Jail to bail him out in cash.

Q. And what did you see there when you got there?

A. I saw Marvin was in a cage in the front room, he was hanging to the bars.

Q. Now, that type of conduct is——

A. Quite usual as far as he is concerned.

Q. Whether he has had something to drink or not?

A. Dead sober, when we have coffee in the morning he acts the same way.

Q. Would you call him a cut-up?

[fol. 88] A. What is a cut-up?

Q. Well, you got me there.

A. Say it in French.

The Court: You had better skip it. He doesn't know.

Mr. DiMaria: Yes, let's skip it. I don't have a Webster here for that definition. I could give you some other definitions, but——

By Mr. DiMaria:

Q. Now, Mr. Frelier, what did you do next after you got to the jail?

A. We went to the jail and found him in a cage, hanging to the bars, quite unhappy. And the jailer—since I was in the jail I thought I might as well kill two birds with one stone. I said, "May I take a look at the establishment?" And he took me all around the place. So Walton obtained his property, which had been taken from him. In the meanwhile, I paid $290 in cash, and Marvin Walton, right before we left, before we left the jail, took his own check book out, which had been given back to him, and wrote me a check in full in payment for the $290 I had paid.

Q. I show you a check dated November 9, 1953, payable to the order of cash in the sum of $290, signed by Mr. Marvin Walton.

A. This check was written—it must have been 1:00 o'clock by then, quarter of 1:00 or 1:00 o'clock on the night when he was supposedly dead drunk and staggering, and his handwriting has never been better than that.

[fol. 89] Q. Well, it isn't much different from what it usually is, is it?

A. In fact, this looks rather steady compared to some of the ones I took.

Q. Now, what was the occasion of Mr. Walton writing out this check? Did you ask him to repay the $290 bail money that you put up for him?

A. I never asked him to pay it up.

Q. When was this written?

A. Near 12:00 o'clock.

Q. Right in the jail, I mean?

A. Right in the jail where he had the money spread out. Before he took anything of his, he took out a blank check and said, "I owe you $290."

Q. I notice he put, "May 9" on here. Did you tell him what the date was?

A. I didn't. No, I did not tell him.

Q. Now, this check was endorsed by L'Omelette in cash?

A. Yes, in cash, right away.

Q. So you have been paid the $290 bail?

A. When he called at midnight—I do not carry $290 in my pocket at all times. I had to take business money, put in an IOU and turn back the check to the business when I got back.

Q. Let me ask you, Mr. Frelier, you observed Mr. Walton at the jail. Did you observe any manner of his conduct that [fol. 90] would indicate that he was under the influence of alcohol?

A. Do you mean under the influence, or intoxicated?

Q. Well, under the influence of alcohol?

A. No.

Q. Was his coordination affected, was his speech affected?

A. He did not strike me as such.

Q. Did he stagger?

A. Not that I know of.

Q. Did you have to assist him in any way, walking out of the jail?

A. I didn't even have to assist him getting into the car, which is hard of access.

Q. It is quite a job to get in that car sober?

A. Yes, it is quite a job to get in sober.

Q. Now, you are the owner of a sports car, aren't you, Mr. Frelier?

A. Yes.

Q. What make is it?

A. Jaguar.

Q. It is a Jaguar. Now, have you found out through your own experience that the enforcement officers of the county and state and city tend to pick out—when you are driving that sports car, tend to discriminate against you?

A. Very definitely. I have cases to prove it. Instances.

Mr. DiMaria: I have no further questions.

The Court: You may examine, Mr. Feeley.

Cross-examination.

By Mr. Feeley:

Q. Do you know Mr. Walton as Mama?

A. Mr. Walton's mother?

[fol. 91] Q. Do you call Mr. Walton Mama?

A. No, we call him Mother.

Q. You call him "Mother"?

A. Yes, it is such a silly story. If you want it, I have a Siamese cat whose name is Mother. Marvin is crazy about the cat and calls himself "Mother."

Q. So he calls himself "Mother"?

A. "Mother." It is childish.

Q. What is his occupation?

A. Oil lease broker.

Q. Does he appear to do anything by way of a living?

A. Seems to get by.

Q. Do you know of anything he does?

A. Selling oil leases.

Q. Does he have an office?

A. He lives 1651 Webster Street; he is a licensed oil lease broker.

The Court: The question is, does he have an office?
The Witness: Do you have an office?
The Court: Never mind, then, don't ask him. You are being asked the question.
The Witness: How would I know.
The Court: If you don't know, say so.
The Witness: I don't know.
The Court: That is the answer.

By Mr. Feeley:

Q. You say you see him at 9:00 o'clock every morning?
[fol. 92] A. Yes, every morning we have coffee at a drive-in in Menlo. He is single; I am single. He doesn't have coffee at the house; I don't either.
Q. You see him every day at the restaurant?
A. Every day, 9:00 o'clock.
Q. Would you say he is the best customer you have?
A. I have a few others.

Mr. DiMaria: I object to that question as being immaterial, prejudicial, improper.
The Court: Objection is overruled. He may answer.

A. The best customer? Oh, no. He is not the best customer, oh, no.

Mr. DiMaria: I object, Your Honor, on the same grounds.
The Court: Objection is overruled.

A. You mean people who drink more than he?

By Mr. Feeley:

Q. Drink more, spend more money there?
A. Oh, yes. I have all kinds of people who spend a lot more money that he does. I don't mean in liquor; I mean general billing.
Q. I mean, he spends more money in liquor than anybody else, is that it?
A. Definitely not.
Q. Would you classify yourself as a professional witness?

Mr. DiMaria: I object to that as being improper.

A. What is that? That I am being paid for it? I don't [fol. 93] need it.

By Mr. Feeley:

Q. How many times have you testified for Mr. Walton?

Mr. DiMaria: I object to that, Your Honor, as being improper and prejudicial.

A. May I answer?
The Court: Just a minute.
Mr. Feeley: It shows interest, Your Honor.
The Court: This is cross examination and it shows interest and bias and motive. Objection is overruled. He may answer.

A. I testified twice in his favor. Both times pertaining to the same case, once in Palo Alto, two months ago, and again today.

By Mr. Feeley:

Q. You also testified for him once again in a case that I prosecuted?
A. I testified once in Palo Alto and once here; twice.
Q. Two different cases?
A. That I wouldn't——
Q. You didn't witness those cases either, did you?
A. What case was the other one?

Mr. DiMaria: I object to this line of questioning, too, Your Honor, as prejudicial.

By Mr. Feeley:

Q. How often does he get drunk there, Mr. Frelier?

Mr. DiMaria: I object to that question as being [fol. 94] completely improper. It is an implication that he does get drunk there.
Mr. Feeley: Wait a minute, Your Honor. He said he always acted the same way.
The Court: Objection overruled.

A. He acted that way at 9:00 o'clock in the morning, with nothing but coffee under his belt.

By Mr. Feeley:

Q. How often does he get drunk there?

Mr. DiMaria: I object, Your Honor, on the same grounds.

The Court: Mr. Frelier, the question is, how often does he get drunk at your place?

The Witness: You mean staggering drunk?

The Court: Yes.

The Witness: I saw him drunk about three years ago, drunk.

By Mr. Feeley:

Q. How much does he ordinarily have to drink, as a daily routine?

A. How much does he have to drink every day? If he comes in the afternoon generally he has beer; he has dinner or goes away. If he comes at night, he generally drinks beer and he doesn't drink enough to—he would be sick before he got drunk.

Q. He was drinking Alexanders this time?

A. That night, yes.

Q. Does he also drink Stingers?

[fol. 95] A. Maybe he does. Stingers? Oh, I suppose so, once in a while.

Q. What time did he leave?

A. That night?

Q. Yes.

A. I have said already that I did not see him leave. I had my dinner at 10:00 o'clock and I don't know whether he left before or after.

Q. What was the last hour of the evening that you saw him, what time?

A. Before—obviously before I had my dinner. It must have been somewhere around 10:00 o'clock.

Q. 10:00 o'clock?

Mr. Feeley: Counsel, I am referring to page 23 of the cross examination of Mr. Frelier.

By Mr. Feeley:

Q. Would you read all of your cross examination?

A. What is there to it?

Q. Is this what you testified to, beginning at line 6, page 23?

"Q. He was a regular customer there?

"A. Not only a customer, but a friend. He hasn't much to do and spends about half the time at my place or house."

A. Yes.

Q. "Q. He was at the restaurant every day?

"A. Yes. Not necessarily drinking or eating, but he [fol. 96] was there.

"Q. On occasion he drank quite heavily and other times not?

"A. Don't we all?

"Q. Have you any particular way of knowing what he drank on that particular night?

"A. I am the one who waited on him until he came there and left. When he left I don't know. I am the only one who waited on him.

"Q. But you didn't see him after 8:30?

"A. No, 8:00 or 8:30, I don't know. Other fellows might. No, I did not.

"Q. There are several bartenders—you have seen me there?

"A. Oh, yes.

"Q. You wouldn't have any idea how much I drank?

"A. No. You, to me, are a customer. Mr. Walton is a customer and a friend.

"Q. You know he drank?

"A. I know he is not a drunk.

"Q. Was he in the following day of the night he was arrested?

"A. He undoubtedly was. He was in the next day."

Mr. Feeley: There was an objection then there was the answer, "He was in the next day."

"Q. Do you know?

[fol. 97] "A. No.

"Q. On May 7, the day before, was he there?

"A. I have seen Marvin Walton practically every day. I am quite sure he was there after the incident. He was in there almost every day.

"Q. Remembering that particular day, you don't know what time he arrived?

"A. He was going to a movie. He dropped in there for a bottle of beer, when evening came he was going to the movie. I made him two Stingers. That I know and I know no one else waited on him.

"Q. But you didn't see him after 8:00?

"A. 8:00 or 8:30. I made that plain."

Mr. Feeley: Just a moment, Your Honor.

I refer you to page 22, line 13, the question there is——

The Court: Just a minute. Too much noise outside.

By Mr. Feeley:

Q. This is direct examination asked by Mr. DiMaria.

"Q. At what hour, if you remember, roughly, did he leave?"

A. That I have no idea. All I heard you say he was picked up around 10:00 o'clock."

Now, you say he had Alexanders to drink?

A. I thought it was Alexanders. It turns out to be Stingers.

[fol. 98] Q. As a matter of fact, you probably have no idea what he had all evening?

A. Having waited on him all evening I probably would not know. That goes back one year, Mr. Feeley.

Q. And you waited on him practically all evening?

A. That goes back one year.

Mr. Feeley: I have no further questions.

Redirect examination.

By Mr. DiMaria:

Q. However, Mr. Frelier, this evening sticks in your mind because of the arrest, doesn't it?

A. Yes.

Q. So you would recall about how many drinks he had that evening?

A. I would say three or four plus the beer he had when he came in. There is no question about that.

Q. And that is from approximately, as you say, shortly after 5:00?

A. Shortly after 5:00 when we opened.

Q. Until the last you know about his presence there, which was about 8:30. Now, you don't mean to state, do you, that he wasn't there after 8:30?

A. I do not remember his being there after 8:30.

Q. I see. You were just merely being honest about it?

A. Completely.

Mr. DiMaria: I have no further questions.

Recross-examination.

[fol. 99] By Mr. Feeley:

Q. How many bartenders do you have there?

A. Two and myself, and three on Friday and Saturday.

Q. And you also have helpers behind the bar?

A. No, three bartenders over the week end, two on week days and myself.

Q. How many waiters and waitresses?

A. In the whole place?

Q. Yes.

A. Six on week days and nine over the week end.

Q. Friday night you would have nine?

A. No, Friday night there would be about eight, I guess. Six, probably. Friday there would be Joe, Minna—Joe, Minna, Sven, Horst, James, probably six, probably six.

Q. Do you mean it varies from week to week?

A. Well, it varies over the week end. We always add a couple on Saturday.

Q. I forgot to mention here, you said he had a beer there also?

A. Oh, yes. Same one he had when I testified.

Q. Now, when you make a drink, do you make a little bit more than an ounce; is that right?

Mr. DiMaria: What was that question?

By Mr. Feeley:

Q. I say, when you make a drink, you make a little more than an ounce, Mr. Frelier?

A. I wouldn't know. The glass is one ounce and I fill it, and probably don't make sure that——

[fol. 100] Q. I don't mean to be personal, Mr. Frelier, but didn't we speak out in the hall a few minutes ago, and didn't you tell me then your shot glasses were one ounce and you put a little more in it?

A. What I said to you off the record, I said, "I will serve you seven-eighths of an ounce whenever you want a drink." That is what I said. That is what you want me to say and by God you will never get more than that, either.

Q. Mr. Frelier, you never recalled anything to eat?

A. No, I know he became involved with some friends who were at the bar who bought him one drink as he was buying for a couple by the name of Smith and a Professor.

Q. Do you know what Mr. Walton means by the expression "You amuse me"?

A. I never heard him say that.

Q. You never heard that expression?

A. No, "You amuse me" I never heard him say that.

Mr. Feeley: I have no other questions.

The Court: You may step down, Mr. Frelier.

The Witness: Take off?

Mr. DiMaria: May I ask one more question?

By Mr. DiMaria:

Q. Mr. Frelier, did you state you were the only one who served Mr. Walton drinks that evening?

A. That evening, I am quite sure I am.

The Court: Just a minute. We have gone over this twice now. There is no reason dragging this out. That is [fol. 101] all direct in the first place and it has been the subject of redirect twice.

Mr. DiMaria: It is in relation to Mr. Feeley's cross examination.

The Court: All right.

By Mr. DiMaria:

Q. If you had served Mr. Walton ten drinks that evening, would you have remembered that?

A. Yes, because I would not have served them to him.

The Court: Did you want to ask about that one question?

Mr. Feeley: I thought I might, but——

The Court: Well, stay on the stand here a minute.

By Mr. Feeley:

Q. What is the least number of drinks you have ever served Mr. Walton?

Mr. DiMaria: I object, Your Honor.

The Court: Objection is overruled.

A. The least number of drinks I have ever served him, he would drop in once in a while and order a bottle of Calso with a lime in it.

Q. What is the least number of drinks you have ever served him?

A. A bottle of Calso with one lime in it.

Q. What is the most you have served him?

Mr. DiMaria: I object. It is prejudicial.

A. I would say five.

By Mr. Feeley:

Q. How do you arrive at that figure?

[fol. 102] A. You ask me, that is the most I will give him.

Q. When was the occasion you gave him five?

Mr. DiMaria: I object to that question.

The Court: The objection is overruled.

A. I don't remember.

The Court: You may step down. Is there any objection to his leaving?

Mr. Feeley: No, Your Honor.

Mr. DiMaria: No objection, Your Honor.

The Court: You may leave, Mr. Frelier.

(Witness excused.)

Mr. DiMaria: Mrs. Taylor.

WANDA LOUISE TAYLOR, called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. DiMaria:

Q. What is your full name, Mrs. Taylor?
A. Wanda Louise Taylor.
Q. Where do you reside?
A. 432 Arbor, Sunnyvale.
Q. And what is your occupation?
A. Hostess.
Q. On the evening of——

The Court: Where?
The Witness: At L'Omelette Restaurant.

By Mr. DiMaria:

Q. Now, did you have that same occupation on the evening of May 8, 1953?
A. Yes, I did.
Q. And did you have occasion to observe Mr. Walton on [fol. 103] the evening of May 8, 1953?
A. Yes.
Q. That was on a Friday; wasn't it, Friday evening?
A. Yes, it was.
Q. Did you have occasion to see Mr. Walton leaving L'Omelette?
A. Well, on that particular night, yes.
Q. And what was the—was there any conversation between the two of you?
A. Well, nothing except that he said, "Good night," and "Take care of Mother," or something to that effect.
Q. And he was referring to the cat?
A. Yes, the cat.
Q. Now, during the time that Mr. Walton was at L'Omelette, did you notice that he was seated at any particular place?
A. Yes, I did.
Q. And what was that place?

A. Well, it is right in front of my—the little station that I stand there. Of course, entering into the dining room you couldn't miss him. He sat there all the evening I know of. I didn't notice him moving.

Q. And is that his usual practice?

A. Yes, he sits on that one particular side.

Q. And that is the portion of the bar that Mr. Frelier attends?

A. Yes.

Q. Have you had occasion to see Mr. Walton sit at any [fol. 104] other portion of the bar when there were seats open at Mr. Frelier's portion of the bar?

A. Not that I have ever remembered, no.

Q. Now, about what time was it that Mr. Walton said, "Good night," to you?

A. Well, it was after I finished dinner, which usually is around 10:30, 11:00 o'clock, somewhere around there. Between 10:00 and 11:00.

Q. Roughly, you didn't look at your watch, did you?

A. No, I did not.

Q. It is an estimate. Did you have occasion to notice anything that would be unusual about Mr. Walton's speech?

A. There was nothing.

Q. When he said, "Good night," to you?

A. There was nothing unusual about him.

Q. Was he perfectly normal?

A. As normal as he is.

Q. Would you say that he was affected in any way by alcohol?

A. No, I would not.

Q. Did you have occasion to notice his manner of walking at that time?

A. He walked out the door.

Q. Did he stagger out of the door?

A. No, he did not stagger.

Q. Did he walk with a lurch?

A. No.

Q. Was there any indication in his manner of walking that would indicate that he was under the influence of alcohol?

[fol. 105] A. Not that I could see.

Q. Would you say that his manner of walking was perfectly normal?

A. Yes.

Q. Was there anything in anything that he did, his demeanor or facial expressions, or anything he did that would denote that he was under the influence of alcohol?

A. No, not that I could see.

Q. In other words, his whole appearance was normal, was it?

A. Yes.

Q. Now, Miss Taylor, this event happened just about—almost a year ago. How is it that you remember these details?

A. Well, this one particular event was brought up the next day because Pierre had to go down and get Marvin out on bail and he mentioned it to me then. I remembered the night before I did see him leave.

Q. And you fixed that in your memory, did you?

A. Well, yes. I remembered him leaving because it was supposed to be a drunk driving charge. Isn't that what it is?

Mr. DiMaria: I have no further questions.

Cross-examination.

By Mr. Feeley:

Q. At what time did he come into the restaurant that night?

A. I don't know. I could have been anywhere on the floor between 5:00 o'clock on because I am seating people. I don't remember when he came in.

[fol. 106] Q. What time did you first notice him then?

A. Well, it was—pinning me down to a definite time, I don't know. I saw him sitting there, but I didn't actually look at my watch to say—it was early, but I couldn't say what time.

Q. He was at the bar?

A. Yes.

Q. He was drinking?

A. Yes.

Q. And he remained at that one spot of the bar during all of the time that you saw him?

A. Yes, in that one particular space.

Q. And that was from 5:00 until 10:00, or thereabouts?

A. As far as I remember he stayed right in that one place. He had friends join him, and he may have moved from one stool to another, but right in the same place.

Q. To you he appeared to be sitting there drinking all night long, then, all the time he was there?

A. I don't know whether he was drinking all evening long.

Q. Did you see him leaving to a table to eat dinner, or anything of that nature?

A. No, because I would see him and I would not see him for dinner.

Q. What was he drinking?

A. That I couldn't tell you.

Q. Did you see him leave the premises?

A. Yes, I did.

Q. Did you see him enter his vehicle, his automobile?

[fol. 107] A. No, I did not. I couldn't even tell you what kind of automobile he was driving that night.

Q. I see. Does he drive a variety of automobiles?

A. I understand he has two, that I know of only by mentioning it, of course. I mean, I don't know anything about his personal life outside of that.

Q. How long have you been employed at L'Omelette?

A. Almost three years.

Q. When were you requested to testify?

A. Well, actually it was mentioned to me many months ago. I don't remember when you had the last trial, or whatever it was. I mean, it was not mentioned to me since they did not need me to testify. It was not mentioned to me any more until last week.

Q. Did you make some notes?

A. No, I did not.

Q. You are relying upon your memory?

A. I remember the one particular night because there was such a discussion the next day about officers that don't like sports cars, or something of the sort.

Q. Now, when did you last see Mr. Walton in L'Omelette?

A. When did I last see him?
Q. Yes.
A. It could have been Saturday; could have been Sunday. He comes in quite often.
Q. What time did he enter on Saturday?
A. I would have no reason to remember.
Q. What time did he leave?
[fol. 108] A. I would not remember either.
Q. You say he was there Friday also?
A. I say he could have been.
Q. Well, when do you last recall that he was there?
A. Sunday evening.
Q. Sunday he was there, Saturday and Sunday?
A. I can't say whether he was there Saturday and Sunday; I remember he was there Sunday.
Q. What did he have to drink that Sunday?
A. I don't know.

Mr. DiMaria: I object to that question, Your Honor.
The Court: Objection overruled. This is testing the credibility of the witness.

By Mr. Feeley:

Q. Have you seen him in there most every day?
A. Yes, he dropped by there most every day because he is a personal friend of Pierre's.
Q. Was he there Saturday also then?
A. That I don't remember. I say he could have been.
Q. How about Friday?
A. He could have been.
Q. Do you know what time he left on Friday or Saturday?
A. No, I do not. I have no reason to remember.
Q. Or any other date, do you remember?
A. Why should I?
Q. What time he entered or left, or what he had to drink?
A. No, I couldn't even tell you what you drink, and I [fol. 109] have seen you at L'Omelette quite often.
Q. Am I in there every day?
A. No, but it hasn't been so long ago that I saw you in L'Omelette.
Q. Was I in there following the last trial of Mr. Walton?

A. If the trial was last year, I would say yes.
Q. Is that the time you recall when I was there?
A. I don't recall. I said I have seen you in there.
Q. I see. Was he staggering or lurching Saturday or Sunday last, when you saw him?

Mr. DiMaria: I object to that question, Your Honor. Prejudicial, unrelated to the issues.
The Court: Objection is overruled.

A. No, he was not.

By Mr. Feeley:
Q. What did he say to you at that time?
A. He asked me if I would testify in his behalf.
Q. That is when he asked you to testify, last Sunday?
A. No, it was mentioned to me probably earlier in the week.

The Court: Just a minute. Was the question that you objected to as recently as last week?
Mr. DiMaria: Last Saturday. I think the question was, "Was he drunk last Saturday?"
The Court: Oh, well, then, the objection is sustained. The answer to that question the jury may disregard.
Mr. DiMaria: I don't ask that it be stricken now. She said, "No."
The Court: If you are going to gamble on what the [fol. 110] ruling is, you are going to have another guess coming. It will be stricken.
I thought the question was directed to this approximate time.
Mr. DiMaria: No, it was last Saturday.
The Court: You may disregard any statement or questions about his condition a week ago.

By Mr. Feeley:

Q. Why didn't you testify at the first trial?
A. I wasn't asked.
Mr. Feeley: I have no other questions.
Mr. DiMaria: I have no other questions.
The Court: All right. You may step down, Mrs. Taylor.
(Witness excused.)

The Court: We will take a recess for five minutes. The jury has been going for almost an hour now.

(Whereupon, a short recess was taken, after which the following proceedings were had:)

The Court: All right. Let the record show that all the jury is present, the Defendant and counsel.
You may proceed, Mr. DiMaria.

MARVIN STUART WALTON, called as a witness on his own behalf, being first duly sworn, was examined and testified as follows:

Direct examination.

[fol. 111] By Mr. DiMaria:

Q. What is your full name, Mr. Walton?
A. Marvin Stuart Walton.
Q. Where do you reside?
A. 1651 Webster, Palo Alto.
Q. What is your occupation?
A. Oilage broker.
Q. You are a licensed oilage broker?
A. That is correct.
Q. Now, will you tell us what you did—let's start with 5:00 o'clock. At 5:00 p.m. in the evening, or day of May 8, 1953.
A. Well, I recall going to the L'Omelette that evening, but whether or not it was 5:00 o'clock I don't know. I would place it between 5:00 and 6:00.
Q. Between 5:00 and 6:00. What happened then?
A. I stayed there until roughly 10 o'clock.
Q. When you went into L'Omelette, where did you seat yourself?
A. At the end of the bar, Pierre's side, nearest the door.
Q. I see. Pierre Frelier?
A. Yes.
Q. Mr. Frelier, does he serve a definite section of the bar?
A. That is correct.

Q. And is it generally the same?

A. Always the same.

Q. Always the same. And do you generally sit at that section?

A. Every time that it is possible to do so, sometimes it is crowded.

Q. I see. All right. But this particular evening you did [fol. 112] sit at the section of the bar that was served by Mr. Frelier?

A. I did.

Q. Did you purchase any drinks at the L'Omelette that evening from anyone other than Mr. Frelier?

A. No, I didn't.

Q. Would you tell us how many drinks you had there that evening and what they were?

A. I had originally a bottle of beer, thereafter I had three Stingers.

Q. Three Stingers. And that was up until what time?

A. Until I left, roughly, 10:00 o'clock.

Q. You left about 10:00. So from between 5:00 or 6:00 and until 10:00 you had four drinks?

A. That is correct?

Q. Did you have anything to eat while you were there?

A. Yes, I had a steak sandwich at the bar.

Q. You had a steak sandwich at the bar.

A. Yes.

Q. All right. Now, you have left. While you were there—withdraw that. At 10:00 o'clock you left?

A. That is correct.

Q. What did you do when you left L'Omelette?

A. I got into my automobile and left.

Q. What automobile is that?

A. A Jaguar roadster.

Q. Is that a sports car?

A. Yes.

Q. What did you do when you got in your automobile?

A. Went up El Camino and proceeded to go home, but was interrupted on the way home by the Highway Patrol.

[fol. 113] Q. The Highway Patrol car. Was it the usual white and black car?

A. Yes.

Q. Did you notice this car when you were leaving L'Omelette?

A. I saw a white and black Highway Patrol car, whether it was that car I couldn't say, but judging from the testimony, apparently it was.

Q. But you did notice that there was a patrol car?

A. Yes.

Q. Did it flash in your headlights, the patrol car, as you were getting on the highway?

A. I noticed it, it was quite obvious.

Q. You have heard Mr. Shannon testify that you rubbed, or ricocheted, or ran into the island at Ferranti's Restaurant?

A. Yes.

Q. Opposite it?

A. Yes.

Q. What did you actually do?

A. I certainly didn't run into any traffic island. I am well aware of that fact. Had I done so, I would have known it and probably damaged the automobile in the bargain.

Q. So you have no recollection at all of having run—brushed into the island, or ricocheted?

A. Absolutely none, no.

Q. How was traffic at that time?

A. I would say it was average, not heavy, not light.

Q. Average for Friday evening at 10:00 o'clock?

A. Yes.

[fol. 114] Q. You heard Officer Shannon testify that you were traveling between 60 and 65 miles an hour?

A. Yes.

Q. And that from Ferranti's on. Is there any truth in that?

A. Certainly not.

Q. About what speed were you going?

A. Along with the traffic, 35, perhaps 40, but certainly no faster than that.

Q. In other words, you had no occasion to observe your speed, did you?

A. In fact, by virtue of the fact I had observed the police car I would have been very foolhardy indeed to have taken off even if I had been so determined.

Q. Now, when did you first notice a siren sounding, or red light flashing?

A. I saw them at the same time. The police car was about, I would say, 20, 30 feet behind me opposite what is now the Flamingo Hotel, or very close to that vicinity and when I saw it I stopped immediately on the side of the road.

Q. You were alone in your car, weren't you?

A. That is correct.

Q. Where were you going, Mr. Walton?

A. Going home.

Q. You were going home at a rather early hour, weren't you, Friday evening?

A. That is right. I had nothing else to do, so I went home.

Q. Tell us what happened after that?

[fol. 115] A. Well, the officer requested that I give him my keys, which I did. Then they asked me to get out of the car.

Q. What did he say to you?

A. Well, he was rather aggressive about it, he said, "Where do you think you are going?" or "Where's the fire?" Some sort of a reference to my speed, in that manner.

Q. And what was the manner of his tone, or voice?

A. Rather authoritarian, domineering, I would say.

Q. Then what else happened?

A. I got out of the car, complying with his request, and he was parked behind me. He walked back by the police car and at that time they requested that I stand on my toes, I think, and perform some sort of a gymnastic maneuver, which I did. Then I stopped and he said, "Go ahead, do it again." Which I did, and in the midst of it he shone this light in my face and that irritated me so I stopped and refused to do any more of it. So they had a brief conference and said, "You are coming with us."

Q. So then what happened?

A. They put me in the police car and drove to San Jose.

Q. When you reached San Jose, where did they take you?

A. To the police office there. I am not familiar with it.

Q. They took you to a certain room; didn't they?

A. Yes.

Q. When you entered that room with these officers, what happened; did they ask you to take certain tests?

[fol. 116] A. That is correct.

Q. And did you comply?

A. No, I objected entirely to the whole procedure.

Q. You refused. Did they ask you to answer certain questions?

A. That is correct.

Q. Did you refuse to answer them?

A. That is right.

Q. On the way up to San Jose, Officer Shannon stated that you were repetitious. Would you explain that?

A. Well, they kept questioning me, where had I been, and where was I going, and what had I been drinking, and I didn't care to discuss the matter. I had given them the answers once and they kept asking the same questions, so I refused to answer the questions.

Q. And they persisted and you refused to answer those questions?

A. That is right.

Q. And did you make the statement to them that "California is my mother"?

A. No, I said in California they referred to me as "Mother" because of this cat incident—I paid so much attention to the cat that people called me the name of the cat, and it was more or less the custom of people who called to call me that.

Q. Will you relate this cat incident that gave rise to this?

A. It is rather asinine, but one of the cats had about 25 kittens, I believe, so naturally we call her Mother, and I sometimes would bring her into the barroom to show her [fol. 117] to friends, she is a very beautiful cat. As a result, people began calling me Mother, and I presumed they were getting whimsical, asking all these questions over and over again. So I told them they called me Mother.

Q. So that name did have meaning to you?

A. Yes.

Q. All right. Now, you say you protested—refused to

give any—to perform any tests, or answer any questions at this first room the officers brought you?

A. That is correct.

Q. That was so up until the time of the blood test, is that so?

A. That is correct.

Q. Now, you heard Officer Shannon testify that you protested giving blood for the test at first?

A. That is correct.

Q. Several times, and Officer Shannon then testified that you finally consented to give them the blood test?

A. I continued to protest.

Q. What happened?

A. The blood was taken from me against my will.

Q. Did anyone hold your arm?

A. What happened, they rolled up my left arm, the sleeve of my left arm and injected the needle and removed the sample, although I continued to object.

Q. And you protested?

A. I did, and afterwards I wanted some notation made [fol. 118] that it was done against my protest. And there was a comment made, "Yes, sure," something like that.

Q. Did they request that you take these tests, balancing or coordination tests after the blood test was taken?

A. That is correct.

Q. They did request you to take them?

A. The same test I had performed on the highway originally, standing on your toes and sort of a balance test, and putting your fingers together, I think with your eyes shut.

Q. I see. And you refused to take those after the blood test?

A. That is correct. They also asked me some—there was a sheet they had—previously there were some questions there I refused to answer.

Q. That was after the blood test was taken?

A. I am not sure whether it was before or after. I think it may have been both times, because they were quite persistent about getting me to answer the questions.

Q. During this time, did you demand to be allowed to call your attorney?

A. As soon as the procedure was over I asked to call

my attorney, and they said, "No, you can't." Apparently they were through with me—taking my fingerprints and the blood sample, so I was turned over to this jailer and placed in the cell despite the fact I had requested to make a phone call. Then ten minutes later they apparently changed their minds and they let me call my attorney, and I called Mr. Frelier.

[fol. 119] Q. Yes. You thougt he would be able to help you more than your lawyer?

A. Yes, I knew he would probably have the cash on him, and you wouldn't.

Q. All right. Then, you were taken from this room and you were brought to the jail; is that correct?

A. Now, which room are you alluding to?

Q. The AIB.

A. I don't know the name of it.

Q. The first room where the blood test was taken?

A. They removed me to another room where they took my fingerprints and photograph.

Q. You have heard Officer Shannon testify that you bumped into a——

A. Water cooler.

Q. —and almost knocked it over?

A. I certainly have no memory of that at all. I am quite certain I would have remembered if I had done so.

Q. Do you have any memory of accepting Mr. Shannon's offer of assistance in walking?

A. No, I was amazed. I thought I would be pushed around, but they didn't do anything to me as far as manhandling me.

Q. You have no recollection, do you, of staggering?

A. No, definitely not.

Q. At any time, would you say you were under the influence of alcohol?

A. No, I would say I was nervous as a result of what had transpired, but I certainly wasn't under the in-

[fol. 120] fluence of alcohol.

Q. Would you say you were under the influence of alcohol at the time you were driving on the highway?

A. Definitely not.

Q. All right, then. They took you—what did they do after they fingerprinted you?

A. They brought me down to this main room and I was placed in a cell shortly thereafter.

Q. That is in the County Jail?

A. Wherever the cell is; I am not familiar with the geography of the place.

Q. And you have stated that they permitted you to make a phone call only when?

A. After they had completed their procedure and then incarcerated me in the cell and I continued to request that I be allowed to make a phone call. Then they locked me up and the fellow came back and said, "Go ahead, you can." I believe it was a jailer.

Q. And you called Mr. Frelier?

A. That is correct.

Q. And he came down?

A. About 45 minutes later.

Q. And when he arrived it was roughly what time, if you have any idea?

A. 12:30, I should say, something like that.

Q. And do you remember the amount of bail?

A. $290.

[fol. 121] Q. Who paid that bail at that time?

A. Mr. Frelier paid it.

Q. Paid it himself?

A. I requested that I be allowed to put up a check, but that isn't accepted procedure, apparently.

Q. Did he pay it by check or by cash?

A. Cash.

Q. After he paid it, what did you do?

A. I immediately wrote a check.

Q. For the $290?

A. That is right.

Q. Is this the check that you wrote and gave to Mr. Frelier to reimburse him for putting up the bail?

A. That is right.

Q. And this check was written when?

A. May 9, which would be just a little after midnight.

Q. At the jail?

A. At the jail.

Q. And they let you out just after the bail was put up?

A. Yes As a matter of fact, Mr. Frelier was taken on a tour of the jail. I didn't wish to see any more of it.

Mr. DiMaria: I would like to introduce, Your Honor, this check in evidence.

The Court: Any objection, Mr. Feeley?

Mr. Feeley: No, Your Honor.

The Court: This will be marked next, Defendant's Exhibit No. 1, and will be received in evidence.

Mr. DiMaria: I have four more checks here Mr. Walton [fol. 122] made at various times.

By Mr. DiMaria:

Q. These checks all are in your handwriting?

A. That is true.

Q. Yes. And were they all made at a time when you had had nothing at all to drink?

A. It would be difficult to state, really.

Q. Well, let's look at the endorsements here. One is endorsed by International Motorcycle Company.

A. Obviously, no.

Q. The others are made to cash.

Mr. DiMaria: Your Honor, I would like to introduce these checks into evidence so that the jury may inspect them to compare them with the check that was written at the jail, the handwriting.

Mr. Feeley: I have no objection.

The Court: Since there is no objection, they will be received and they will be marked as one exhibit. Defendant's Exhibit No. 2-A through D, inclusive.

(Whereupon, the above-mentioned documents, being checks, were received in evidence and marked Defendant's Exhibits 2-A through D.)

By Mr. DiMaria:

Q. Now, Mr. Walton, you have driven a sports car on the city streets and the public highways?

A. Yes, several of them.

Q. You know, of your own experience, as to whether there is a common plan, or common prejudice, of enforce-[fol. 123] ment—law officers in picking on the drivers of sports cars?

A. It would appear to me that there is. I know that I

have been stopped quite frequently in that car. Not necessarily cited, but warned for some imagined infraction; whereas that seldom happens to me in other types of automobiles.

Q. And you do drive another automobile?

A. That is right. If anything, I drive the sports car more slowly than the other car, because I realize it is attention-getting.

Q. And you still have your sports car?

A. I have it, but I don't use it very often. As a matter of fact, I am trying to sell it for just this very reason, it makes me nervous to drive it, I spend half the time looking out the rearview mirror.

Q. And have you had any difficulty in selling it?

A. Yes, for that very reason, too, as a matter of fact.

Q. I see. Purchasers have brought that up?

A. That is right. It is a rather expensive car and most of the private parties I have contacted on it that can afford the car are somewhat dubious as to their ability to drive it around and not be troubled.

Q. All right. You were charged with driving while under the influence of alcohol and speeding at 65 miles per hour on May 8, 1953; is that correct?

A. That was the charge. Yes, sir.

Q. Those were the charges. There was a trial of those [fol. 124] charges on November 18, 1953; is that correct?

A. That is correct.

Q. Where were you at that time?

A. At that time I was in Utah, I believe.

Q. And why were you in Utah instead of being at the trial?

A. Well, I was in Europe four months previous to that and when I received the notice my trial was coming up on the 20th I left with adequate time to get back, but unfortunately my crossing was delayed three days on the ocean and then we met this snowstorm coming across the country, and as a result I arrived on the 20th instead of the 18th.

Q. And you had demanded a jury trial prior to leaving?

A. Yes.

The Court: I don't think we need to go into that.

Mr. DiMaria: I think I can go into it, Your Honor.

Mr. Feeley: If he wants to go into it, I can open up the whole thing, Your Honor.

The Court: Of course, but you are not going to.

Mr. DiMaria: I would like to make an offer, Your Honor.

The Court: What has that to do with this?

Mr. Feeley: Of what?

Mr. DiMaria: Of what happened at the other trial.

The Court: What has that to do with this one?

Mr. Feeley: I don't understand how counsel will have an offer of proof in it.

[fol. 125] The Court: I don't either. The jury may be excused for five minutes. You may leave the room.

(Whereupon, a recess was taken, during which time the Court and counsel had the following proceedings:)

Mr. DiMaria: The reason I want to bring that in, Your Honor, I think it should be made clear to the jury. There have been many, many references to a former trial.

The Court: Most of which you made.

Mr. DiMaria: Well, I wouldn't—many of which have been made by Mr. Feeley.

The Court: Go ahead.

Mr. DiMaria: And this speeding thing has been brought up, which is prejudicial, brought up by Mr. Feeley. Officer Shannon was the first one to mention that.

Mr. Feeley: What, for example?

Mr. DiMaria: Speeding charge, that he was going 60 to 65 miles per hour.

Mr. Feeley: That is evidence.

Mr. DiMaria: And I think that the jury should be made acquainted with what happened, that Mr. Walton was denied his right to a jury trial and that is why we are here today.

The Court: That has absolutely no bearing whatever on the charge made now. That is very prejudicial, I won't even listen to argument. You are overruled on that.

Mr. DiMaria: And then my offer of evidence?

The Court: Your offer of proof to bring in any testimony [fol. 126] about the former trial for the purpose you have just stated is wrong, and I am going to warn you while the jury isn't here not to fool around with it either when the

jury is here. Now, don't try to slide it in by innuendo. All right, bring the jury back.

(Whereupon, the jury was returned to the court room and the following proceedings were had:)

The Court: All right. Let the record show that the jury is all present, the Defendant and counsel.
You may proceed, Mr. DiMaria.
Mr. DiMaria: I have no further questions.
The Court: You may examine.

Cross-examination.

By Mr. Feeley:

Q. How do you account for the alcohol that was in your blood?
A. You mean how do I account for the fact that there was alcohol in my blood?
Q. The amount of alcohol in your blood?
A. It is absolutely unaccountable.

Mr. DiMaria: I object, Your Honor, to that question as presupposing a fact.
Mr. Feeley: It is a fact in evidence.
Mr. DiMaria: Mr. Feeley has waved his head in the direction of the board that indicates a sample was taken at 2.4, and that is what he is referring to. I object to any questioning in that line.
[fol. 127] The Court: Objection is overruled. He may answer.

A. Will you repeat the question.

By Mr. Feeley:

Q. How do you account for that amount of alcohol that was in your blood?
A. I can't account for it. I don't believe it to be correct.
Q. Did you inject yourself at any time that night with alcohol?
A. Absolutely not.
Q. You did nothing but consume it; is that correct?

A. I wouldn't say I did nothing but consume it. I ate and talked and other things.

Q. For five hours?

A. That is correct.

Q. Now, you first started with what, sir, in your drinking?

A. You mean what kind of a beverage?

Q. Yes.

A. A bottle of beer.

Q. Then what did you have?

A. I had three Stingers.

Q. And what is a Stinger?

A. I can't tell you that, sir, I don't know enough about mixing drinks to tell you.

Q. Do you always order Stingers?

A. Not always, occasionally. I didn't want to drink four bottles of beer—that is three more bottles of beer. I thought one bottle of beer was enough.

Q. What time was it when you had your second Stinger?

A. It would be hard to state. I know I consumed three of them after I consumed the bottle of beer and until I left, [fol. 128] but at what particular hour I consumed the second one I don't know, somewhere between, say, 6:00 and 10:00 o'clock.

Q. When did you have your first Alexander?

A. I don't recall having an Alexander. I think it was a Stinger.

Q. When did you have your second Alexander?

A. I don't recall having an Alexander, I stated.

Q. Mr. Frelier was wrong, then?

A. As he stated, he said he thought it was an Alexander and he had said it was a Stinger previously; that is what it was.

Q. What time was it when you had your second Stinger?

A. Again, I can't answer. It was between 6:00 and 10:00 sometime.

Q. That covers four hours?

A. That is right. I don't look at my watch every time I take a drink; it was after the bottle of beer and prior to leaving.

Q. How did you feel after the first beer and the first Alexander?

A. How did I feel?

Q. Yes.

A. I felt perfectly normal.

Q. All right. How did you feel after the first beer and the second Alexander?

A. Not Alexander, it was Stinger.

Q. Stinger?

A. I had this steak sandwich in between.

[fol. 129] Q. What time did you have this steak sandwich?

A. I would say probably somewhere between 8:00 and 10:00.

Q. Sometime between 8:00 and 10:00?

A. That is right.

Q. When did you have your third Alexander?

A. Stinger.

Q. Stinger?

A. Prior to leaving. I would say between 9:00 and 10:00, as close as I can get.

Q. All right. And that is all the drinks that you had?

A. The three Stingers and the beer; that is correct.

Q. All right. And you were there the previous night?

A. I couldn't say whether I was or not.

Q. Thursday?

A. I have no recollection. The night previous to the arrest you are referring to?

Q. Yes.

A. No, I don't remember.

Q. How about the Friday, or Wednesday, the prior Wednesday?

A. I couldn't say. I can't remember.

Q. Are you there every day?

A. Not necessarily; sometimes I am. Sometimes for several weeks I will be there every day.

Q. Were you there the following day?

A. Following what day?

Q. The following day, the Saturday following?

A. Possibly, I couldn't say with certainty whether I was or not.

Q. Were you there on Sunday?

[fol. 130] A. Quite probably, because I generally make it a point to get down Sunday. I think it is a safe assumption I was.

Q. What time were you there on Sunday?

A. Couldn't tell you.

Q. What did you have to drink on Sunday?

A. I couldn't tell you; don't recall.

Q. Now, do you generally make a fool of yourself?

Mr. DiMaria: I object to that question, it calls for a conclusion.

The Court: The objection is overruled.

Mr. Feeley: It came in with this witness.

Mr. DiMaria: And furthermore, Your Honor, I object. It is an implication that he does make a fool of himself.

The Court: It is overruled. The testimony came in by one of your own witnesses. This is cross examination.

By Mr. Feeley:

Q. What does Mr. Frelier mean by, "You make a fool of yourself"?

A. He is no doubt relating I am somewhat of a light-hearted nature and exuberant.

Q. What is your definition of "light-hearted and exuberant"?

A. Would you repeat the question, please?

Q. What is your definition of "light-hearted and exuberant"?

A. I give vent to whims of fancy of mind.

Q. For example?

A. I talk a lot sometimes and sometimes I sing songs and do dances. I take a comic view of [fol. 131] life sometimes, not only when I drink alcohol.

Q. You are not that way generally, then?

A. Quite frequently.

Q. Would you say you are normal today or otherwise?

A. No, I am more restrained today than I generally am.

Q. More restrained. All right. Now, you left at what time, sir?

A. Left what, L'Omelette?

Q. Yes.

A. The evening of the citation?

Q. Yes.

A. Roughly 10:00 o'clock.

Q. All right. And where did you have your vehicle parked?

A. In front of L'Omelette parking lot.

Q. And you drove out from the front of L'Omelette; is that correct?

A. That is correct.

Q. How was the traffic at that time?

A. It wasn't particularly noticeable. By that I mean it struck me as being neither heavy or light. I have no particular impression of it being either heavy or light.

Q. Did you stop before you entered the highway?

A. I did, at the road passing L'Omelette, that goes out past L'Omelette. There is a break in the double line for the benefit of people who want to cross the double line without violating the law, and I always make it a habit of crossing at that point, and this evening was no exception.

Q. You say there is a break in the highway?

[fol. 132] A. In the double line. I mean so you can cross to go to San Francisco without going across the double line, it is an arterial stop.

Q. At the street that intersects the highway at L'Omelette?

A. Yes.

Q. Did you come out that way?

A. That is correct.

Q. Not from L'Omelette?

A. They are contiguous.

Q. Did you pull out and pull to your left up across this intersection?

A. Yes, I always do.

Q. How long were you stopped there?

A. At the arterial?

Q. Yes.

A. Long enough for traffic to pass. There is no light there.

Q. Was there traffic from both directions at that time?

A. That is correct.

Q. All right. Now, how many vehicles were ahead of this Highway Patrol car when you pulled out?

A. I don't quite understand the question. How many were ahead of it? I have no way of knowing. Within what area?

Q. When you pulled out upon the highway?

A. I don't know what you mean.

Q. How many cars were in the righthand lane; the outside northbound, or westbound lane?

A. Probably several. I have no way of remembering. If it had been a long string of cars, I would have remembered [fol. 133] it, I just have no impression of it one way or the other. I know I waited until the road was clear and then I crossed.

Q. Where was the Highway Patrol car when you pulled out?

A. On the other side.

Q. Where?

A. Opposite L'Omelette.

Q. Opposite where L'Omelette?

A. I don't know the name of the building across from L'Omelette.

Q. What lane of traffic was it?

A. I would say probably in the righthand lane.

Q. Outside lane?

A. That is right.

Q. Were there any vehicles to the left of the patrol car?

A. Not when I crossed. Otherwise I wouldn't have been able to cross at that time because they would have been at the same place I would have been; they undoubtedly were behind him.

Q. Did you pull out in behind the patrol car?

A. No, I pulled out and went down the highway ahead of it.

Q. How many cars were ahead of the patrol car when you pulled out?

A. In what area?

Q. You were there, Mr. Walton?

A. That is correct.

Q. How fast were you going then when you pulled out?

A. 30, I suppose.

Q. 30?

A. I can't see how I could have gone much faster and made the turn on the other side of the highway.

Q. What turn is that, sir?

[fol. 134] A. To traverse the highway and make the left turn to San Francisco.

Q. Are you referring to a turn around the traffic island?

A. No, the turn directly across from L'Omelette. I mean, it is a turn I would have to make in order to proceed down the highway towards San Francisco. There isn't a turn in the road there; there is no traffic island directly in front, or near L'Omelette. It is further down toward Ferranti's.

Q. What turn are you referring to?

A. I am referring to the fact I turned when I cross the highway toward San Francisco.

Q. You left the lane at an angle; is that what you mean?

A. I entered the lane between the breaks in the double white line.

Q. All right. How fast were you going when you entered upon the northbound lane?

A. I would say 30, 35 after proceeding. I don't think I was going over 30 when I crossed the highway.

Q. How fast were you going when you approached this traffic island?

A. Probably 35, perhaps 40. I am sure no faster than that.

Q. After you passed this traffic island how fast were you going?

A. I don't recall changing my speed at all after passing the island.

Q. All right. You were going how fast when you went by this island?

A. 30 to 40 as near as I can say.

[fol. 135] Q. What lane of traffic were you in at that time?

A. Righthand.

Q. You were in the outside lane?

A. Outside lane; that is right.

Q. So you weren't by the traffic island at all?

A. Not unless I passed a car at that stage.

Q. Do you recall?

A. I don't know. I had no reason to recall it then. I do recall I did not brush the traffic island.

Q. How many vehicles did you pass before you got to the island?

A. I can't say for certain that I passed any of them.

Q. Were you behind any vehicles?

A. Undoubtedly.

Q. What does "undoubtedly" mean?

A. Well, assuming medium traffic conditions prevailed at that time, there would certainly be automobiles ahead of me on the road.

Q. In close proximity to where you were driving?

A. I would say I was traveling along with traffic in a general stream, not faster or slower.

Q. What do you mean, you would say?

A. I would say between 30 and 40 miles an hour.

Q. What do you mean, "I would say"? Do you know?

A. I wouldn't say so if I didn't. Somewhere between 30 [fol. 136] or 40 miles an hour.

Q. Do you have some sort of super manifold on your Jaguar?

A. No.

Q. Or whatever that thing is that would make it go 150 miles an hour?

Mr. DiMaria: I object to that, Your Honor, as again prejudicial, again working on a sports car angle.

The Court: If it is not true, all he has to do is say so.

Mr. DiMaria: It is not that, Your Honor, it is injected for a different purpose. It is not material, no relationship.

Mr. Feeley: In relation to sports cars, I never entered it. The Defendant injected it at the interrogation of the jury.

The Court: That is correct.

By Mr. Feeley:

Q. What is the speed of that Jaguar, top speed?

A. Approximately 125, or 130.

Q. Is that what you have driven it at?

A. No, I am just assuming it from the specifications of the automobile.

Q. How fast did you drive it?

Mr. DiMaria: Is that this particular night?

Mr. Feeley: Any time.

Mr. DiMaria: I object to that as immaterial.

[fol. 137] Mr. Feeley: He is trying to show he has been picked on.

The Court: Overruled.

Mr. DiMaria: It has nothing to do with whether he has been picked on or not.

The Court: After the ruling has been made, don't argue with counsel. He may answer.

A. I drove the car two years ago at Bonneville at 125, if I recall, which is a speed event sanctioned by the authorities.

By Mr. Feeley:

Q. Do you recall telling these officers that if you had known they were behind you, you would have left them in the dust?

A. At first I saw them when they were behind me.

The Court: The question is, do you deny ever having told them so?

The Witness: I categorically deny ever having made such a statement.

By Mr. Feeley:

Q. What was the first thing you said when Officer Daly approached you?

A. I believe he asked me for my keys.

Q. What was the second thing that was said?

A. "Where do you think you are going?" or some words to that effect, or "Where is the fire?"

Q. What did you say?

A. I said I wasn't speeding. I don't know why I was be-

[fol. 138] ing stopped.

Q. Did you say, "If I had known you were behind me, I would have left you in the dust"?

A. I have already answered that question.

Q. Excuse me. Did you use this expression, "If I had known you guys were there you would never have caught me"?

A. No, I certainly didn't use that expression. In the first place I knew they were there because I saw the car when I left L'Omelette and presumed they would follow me. I had been followed before and was expecting that.

Q. I thought you stated here you didn't notice it until you were close to——

A. I stated I saw the car when I came out of L'Omelette. I just made that statement.

Q. You saw this police car traveling 20 to 30 feet behind you. And when you saw it you stopped?

A. That is when they turned on their lights and siren, yes. At that time there was no question of conjecture that they were following me and I stopped immediately, but I saw the car when I came out of L'Omelette.

Q. How is it you didn't see it proceeding down the highway behind you?

A. I had no reason to believe they would stop me.

Q. Why did you stop if you weren't traveling at an excessive rate of speed?

A. Because of the siren and red lights.

[fol. 139] Q. Why didn't you just pull over to the side and let them pass?

A. I did pull over to let them pass.

Q. Why did you stop?

A. Anybody stops when a police car stops them.

Q. Was there traffic in the middle lane at the time they stopped you?

A. In the middle lane?

Q. Yes, speed lane?

A. In the high speed lane, there may have been.

Q. Was there?

A. Couldn't say for certain.

Q. Was there high speed traffic that had just passed you?

A. I can't recall.

Q. Do you recall any vehicles passing you?

A. No, I don't. Nor do I recall passing any other vehicles.

Q. Mr. DiMaria—you said you were going home?

A. Yes.

Q. Mr. DiMaria stated you were going home at an early hour that evening. How late do you ordinarily stay there?

Mr. DiMaria: I object to that question, Your Honor, immaterial.

The Court: Overruled.

A. How long do I usually stay? Sometimes I run into friends and stay until midnight. Sometimes I will see no one I know and leave in 15 minutes.

Q. You mean you never stay until closing?

A. I do occasionally, yes.

[fol. 140] Q. You say the officer was domineering. How was he domineering?

A. His attitude was unnecessarily brusque.

Q. Yes, sir.

A. I have no reason to know why it would be brusk.

Q. What was his tone? What did he do?

A. He made some allusions as to where the fire was, or who did I think I was. Some such comment.

Q. You don't recall exactly what was said?

A. I do recall his early thrust.

Q. It was requested that you stand on your toes?

A. That is right.

Q. I see. And you went through a gymnastic maneuver?

A. That is right.

Q. Now, what was gymnastic about it?

A. You were required to stand on your toes and something about putting my hands together, as I recall it, and holding my head up in the air and standing on one foot with my eyes closed, as best I can recall.

Q. You mean it was gymnastic because you couldn't do it?

A. No, not at all. I don't know what else you would call it, though.

Q. It was gymnastic as far as you were concerned at the time; is that it?

A. I use the term "gymnastic" for lack of a better term to describe it. I didn't know what the technical name of the [fol. 141] maneuver was.

Q. How long have you been in the State of California?

A. Since when?

Mr. DiMaria: I object to that question as being immaterial and not related to the case.

The Court: Objection is overruled.

A. I have been in the State of California for the past six weeks anyway.

By Mr. Feeley:

Q. Prior to this particular occasion on May 8th?

A. Prior to that? I have no way of knowing.

Q. Four years, five years, six years?

A. Oh, no. I go in and out of the state all the time.

Q. Don't you have a residence in Palo Alto?

A. That is correct.

Q. How long have you lived there?

A. You mean how long has that been my legal residence? Or how long have I resided there? There is a great deal of difference in the answer.

Q. Either way.

A. It has been my legal residence for perhaps 20 years or more, but I have spent much of my time away from home, years in fact.

Q. Why have you never acquired a California driver's license?

Mr. DiMaria: I object to that question, Your Honor, [fol. 142] as being immaterial, not related to the issue.

Mr. Feeley: I think it is, Your Honor. He has had no license.

Mr. DiMaria: I have just been refused one like that, Your Honor.

The Court: There is no bearing on that. The testimony is that when he was picked up he had a British license and a Florida license. The objection is overruled.

A. What was the question again?

By Mr. Feeley:

Q. Why had you never acquired a California license?

A. I was under the impression that one—I did not need one inasmuch as I did not stay in the state more than 30 days continuously and I had been stopped before and no

one did anything about the license. The officers that stopped me regarded it as being legal.

Q. Did you make a practice of keeping all of your tickets in the glove compartment?

Mr. DiMaria: I object to the form of that question, Your Honor. Again, it is an implication that he had tickets.

Mr. Feeley: He stated he had tickets, on direct examination.

The Court: Objection is overruled. He may answer.

Mr. Feeley: Counsel, he said he had been cited frequently as a sports car driver.

The Court: Don't argue, counsel. It has been ruled [fol. 143] on.

A. I said I had been stopped several times. And warnings were given most of the times I was stopped. I was not given a citation. In the second place, the Jaguar doesn't have a glove compartment.

By Mr. Feeley:

Q. Did you receive letters from the Court for not answering your tickets?

A. The only time I ever received a letter was a parking meter violation, not for any moving violations.

Q. Was your Jaguar licensed?

A. Yes.

Q. Do you also have a motorcycle?

A. That is correct; I have two of them.

Q. Are they licensed?

A. Both licensed.

Q. When were they licensed?

A. 1953, 1954.

Q. Do you make a practice of not licensing your motorcycle?

A. No.

Q. What?

A. No. As a matter of fact, my license has been over at a fellow's who works on the car, for something like six or eight months, or more. I have been waiting for a frame

for it. It hasn't been on the motorcycle; it has been there. It is now on there.

Q. You just didn't have it on the vehicle; is that correct?

A. That is correct.

Q. What else happened there at the scene when you were——

[fol. 144] Excuse me just a moment. We may go back. Were you a resident of Canada or British Columbia?

A. No, I have been there. I have never been a resident.

Q. How did you happen to have a license from Canada or British Columbia?

A. Never did.

Q. What license did you have from Canada?

A. I had an International Driver's License, which I have used in Europe. It is required, and I think Canada is probably one of the subscribing parties to the agreement. I know I have never obtained a specific Canadian license.

Q. Do you have a Florida license?

A. That is right.

Q. Was your legal residence in Florida or California?

A. It is California.

Q. Why did you have Florida——

Mr. DiMaria: I object to this line of questioning, Your Honor. It is completely immaterial, tends to be prejudicial to the Defendant.

The Court: Overruled.

A. What was the question?

By Mr. Feeley:

Q. Why did you have a Florida license and not a California license?

A. I never thought it was necessary to have it. I thought the Florida was valid as long as I wasn't here continuously, and by virtue of the fact that when I had been stopped and showed the license, no point was made out of it until this ticket to me.

Q. All right. Was there anything else that happened [fol. 145] there at the scene where you were stopped?

A. Anything else? Well, in addition to what I have already said?

Q. Yes.

A. Performing the tests and getting out of the automobile and giving them my keys?

Q. You mean the gymnastic tests?

A. That is right, yes. When I was performing the tests they wanted me to perform the tests twice for some reason. The second time I did it the officer shone his flashlight in my face in the midst of one of these toe dances that I was doing and that was rather irritating and I refused to cooperate any more at all after that. Then they had a brief conference and decided I was going to jail; so they put me in the back of the car and that was the end of it.

Q. Why didn't you give your name?

A. Because of the treatment I had received. I had plenty of time to give it down there as long as they were going to take me to jail; further, he had already seen my license and credentials.

Q. Did he—did you tell him who you were?

A. I guess I didn't.

Q. Why not?

A. I already regarded their attitude as being hostile, and I thought it would be better not to say anything until I had advice of counsel.

Q. Why did you need advice of counsel?

A. I thought it was unjust; I was unjustly accused.

[fol. 146] Q. So your way to handle things is to be belligerent?

A. I won't say it was belligerent; I just didn't care to cooperate with them, the situation being what it was. As far as my identification, they had my documents, and I was going down to be booked, and I would have to give them information at that time. So I saw there was no reason for being particularly forward about it.

Q. When you were booked, did they take a photograph?

A. That is right.

Q. Why didn't you want your photograph taken?

A. The idea of having a photograph taken with a number taken on it is obnoxious. I think it implies you are a criminal.

Q. Why did you prefer having a profile rather than the front view?

[fol. 148] Q. And you only answered two or three questions here?

"*Q.* Were you operating this motor vehicle?

"A. Yes.

"*Q.* Where were you going?

"A. Home.

"*Q.* And from where did you start?

"A. Stanford.

"*Q.* When did you leave?

"A. 10:15.

"*Q.* How many stops made?

"A. Don't know.

"*Q.* Where?

"A. No idea.

"*Q.* What for?

"A. No comment."

And you had "No comment" through the balance of the questions. Why did you tell them you started from Stanford?

A. Possibly because I misunderstood their question. I probably was out there prior to going to L'Omelette.

Q. You were probably out there prior to going to L'Omelette?

A. That is true.

Q. Were you?

A. Otherwise I wouldn't say so. I don't recall whether I had been at Stanford or not. But if I stated that, probably I was.

Q. Did you want to keep out the fact that you had been at L'Omelette that night?

A. Heaven's, no. Why should I?

Q. All right. They requested that you give a sample of blood?

A. That is correct.

Q. You gave a sample of blood?

[fol. 149] A. I was obliged to give a sample of blood.

Q. How were you obliged?

A. By telling that "You had better comply or else." The "or else" being implied, so I stopped refusing. The other one rolled up my sleeve and I stated during and after it that I didn't want my blood sample taken and I wanted

it noted that I was protesting it, and they said, "Yes, sure."

Q. Why didn't you want your blood sample taken?

A. I don't want anyone sticking a needle i to me. Why should I?

Q. How much blood did they take?

A. A syringe full.

Q. About two or three centimeters?

A. I don't know.

Q. You stated they did not push you around, you were not manhandled?

A. That is true.

Q. How did they force you?

A. One said, "You have got to take this test and that is all there is to it." The other one rolled my sleeve up and the other one took my arm and stuck the needle into the arm. I said, "I am objecting to this." The only way I could object to it physically was to shove them away, and that would have aggravated the situation.

Q. Were the officers holding you by the arms when the test was given?

A. No, not by the arms. My sleeve was rolled up and my arm held out and I was told to take the test, and that [fol. 150] was all there was to it.

Q. Who held your arm out?

A. The man in the office, I don't know who it was.

Q. They were holding your arm?

A. They were, and released it when they took a sample.

Q. How did they hold your arm?

A. Like this, (Indicating).

Q. How were there two of them?

A. One was holding the end of it and the other one took the hypodermic needle, the technician, and inserted it.

Q. The technician, did he take the blood sample from your front or your side or what?

A. You mean where he was standing at the time?

Q. Was he standing when he took a sample?

A. Bending over.

Q. Where were you?

A. I was seated in the chair.

Q. Did you put your arm across the table?

A. I don't recall.

Q. You don't recall?

A. Not putting my arm on the table, no. I recall it being extended and the sleeve being rolled up and telling me I would have to submit to it.

Q. You have no recollection of walking into the water cooler?

A. I have no recollection of even seeing the water cooler, much less bumping into it. I am certain if I had bumped [fol. 151] into it I would have remembered it.

Q. With reference to sport cars, have you ever been stopped or arrested by these officers before?

A. No.

Q. Since?

A. No.

Q. Why do you say they were picking on you?

A. I believe I didn't say they were picking on me, necessarily. I said their manner was rather brusque, unnecessarily so, I thought.

Q. I thought they were picking on you because you were a sport car driver?

A. I was referring to police in general, not these particular officers. I state that sport car drivers are singled out for special attention.

Q. The last time we met you weren't driving a sport car, were you?

A. No, I wasn't.

Q. You say you were allowed to phone 10 minutes after you were booked?

A. After I was placed in the cell. That is right. First I was told I couldn't phone, and put in the cell. Then I was released 10 minutes later, saying I could make one phone call if I wished.

Q. Would you expect anything faster if you were an ordinary citizen? Any other person who is arrested?

Mr. DiMaria: I object to that question, Your Honor.

[fol. 152] The Court: Objection is overruled.

A. I am an ordinary citizen.

By Mr. Feeley:

Q. Can you visualize how that process could be speeded up?

A. Yes, as soon as I requested it, I could have phoned. The tests were all over.

Q. You mean you shouldn't have been booked?

A. Well, let's get through one thing at a time. Why couldn't they have let me phone before being put in jail? Later I was released.

Q. You were released just as soon as they had finished their procedure?

A. No, I was placed in the cell and then released about 10 minutes after being told I could not phone anyone. Then some jailer, or functionary, let me out and said I could make one phone call, and then put me back until Mr. Frelier appeared with the bail.

Q. It that unreasonable?

A. I would say so, yes, unless they had informed me at the time they were busy, instead of just saying, "No, you can't make a phone call." And shoving me in a cell.

Q. You mean you should have been treated as a privileged dignitary?

A. No, the only conclusion I could come to was they were going to let me stay in the cell without any phone calls.

Mr. Feeley: I have no other questions.

[fol. 153] Mr. DiMaria: I have no other questions.

The Court: You may step down, Mr. Walton.

(Witness excused)

Mr. DiMaria: Mr. Weaver.

EDWARD W. WEAVER, called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. DiMaria:

Q. What is your full name, Mr. Weaver?
A. Edward W. Weaver.
Q. And where do you reside?
A. Menlo School and College, Menlo Park.
Q. What is your occupation, Mr. Weaver?
A. Instructor.
Q. At what school?
A. Menlo.
Q. At Menlo Junior College?
A. Yes, sir.
Q. Now, you are acquainted with Mr. Walton?
A. I am.
Q. And when did you first become acquainted with Mr. Walton?
A. I think it was '41, possibly '42. I can't—don't quite remember it.
Q. What was the occasion?
A. He was a freshman at Menlo.
Q. He was a student at Menlo?
A. Yes, sir.
Q. How many years did he spend at Menlo?
A. I forgot whether it was one, then, before going into [fol. 154] the service and then came back later for another year, or whether he was there more than a year. I cannot recall.
Q. Anyway, you have met him repeatedly since 1941 or '42?
A. Yes.
Q. And on the evening of May 8, 1953, you had occasion to see him; is that correct?
A. Yes.
Q. And will you tell us what happened that evening? I mean—about what time did you see him?
A. Oh, I hadn't seen him for a long time previous and I

haven't seen him since, but I remember that particular occasion, checked on it in my engagement book. I miscued on a dinner party and got there a week early, so came back to L'Omelette for dinner.

Q. Where was this dinner party to be held?

A. In Los Altos.

Q. In Los Altos?

A. So I came back to L'Omelette for dinner and ran into Marv at the bar and talked to him.

Q. I see. As a friend?

A. Oh, yes.

Q. Yes. And you sat next to him at the bar?

A. Yes, for a while.

Q. And how long did you sit there talking to Mr. Walton?

A. I wouldn't know. It may have been a half-hour to an hour.

Q. I see. And what time was this that you were talking to him at the bar?

[fol. 155] A. I would think it was some time between 8:00 and 9:30. I wouldn't know exactly because I left him and went to join some friends at a table and sat with them for a while. I didn't——

Q. Now, during this time that you were in conversation with Mr. Walton, what were the subjects of discussion; do you remember?

A. The trip to Europe that he was planning, the car, let's see. I don't remember. Probably mutual friends—, undoubtedly, in fact.

Q. Would you, in your opinion, state that his conversation was normal?

A. Perfectly.

Q. Knowing Marvin Walton as you do and did at that time, would you say it was normal?

A. Characteristic.

Q. Characteristic of Mr. Walton?

A. Yes.

Q. In what way is it characteristic?

A. Well, he has a—always has had, for me, a very definite style of personality; sometimes very serious, sometimes very debonaire, offhand, about as usual.

Q. Yes. Did you notice if his speech, or demeanor, conduct in any way was influenced by alcohol?
A. Not at all.
Q. In your opinion, then, he was sober at that time?
A. Yes.
Q. Would it be a definite opinion?
A. Yes, sir.

Mr. DiMaria: I have nothing further.

[fol. 156] Cross-examination.

By Mr. Feeley:

Q. You say he was a former student of yours?
A. Yes.
Q. What did you teach?
A. English.
Q. Was he a good student?
A. Yes.

Mr. DiMaria: I object to that point in the question, Your Honor.

The Court: This is legitimate cross examination, counsel. You don't serve any purpose by objecting to every question that is asked. You know that the scope of cross examination is fairly broad and that counsel has a right to test the credibility, observation, and the basis upon which this witness has given his opinions and stated what he saw and observed. We will save a little time.

Mr. DiMaria: Your Honor, my understanding is it is limited to the direct examination and no more.

The Court: Well, you can have your understanding. I am telling you what this Court is doing as a matter of law. Objection is overruled.

You may proceed.

By Mr. Feeley:

Q. What were you drinking, Mr. Weaver?
A. Why, I don't recall, probably a Scotch, or Scotch Mist.
Q. You don't recall what you were drinking?
A. Probably that.

Q. Why do you say probably that, sir?

A. That is what I would normally order there.

[fol. 157] Q. You say "probably Scotch, or Scotch Mist"?

A. Yes, probably Scotch Mist.

Q. You say you would probably order that?

A. Yes.

Q. When was the last time that you ordered that?

A. When?

Q. Yes.

A. At L'Omelette.

Q. At any place?

A. Gee, I would have no idea.

Q. You have no idea? Did you have any Stingers?

A. No.

Q. You had no Stingers?

A. No.

Q. Did you have Alexanders?

A. No.

Q. How many drinks did you have?

A. You mean with Marv at the bar?

Q. All right. How many drinks with Mr. Walton at the bar?

A. Probably one, or possibly two. I wouldn't know.

Q. How many drinks had you had?

A. I don't think I had had a drink before I joined Marvin at the bar.

Q. What time did you get there?

A. Around 7:30.

Q. How many drinks did you have after that?

A. Probably not more than two or three. Just after dinner I had drinks with Marvin and then I joined friends at a table and had liquor, that was later in the evening.

Q. What time did you leave?

[fol. 158] A. Well, sometime between 10:00 and 11:00.

Q. Are you acquainted with Mr. Frelier?

A. Yes.

Q. Where did you meet him, sir?

A. At L'Omelette.

Q. How long ago, sir?

A. Well, see, when was the L'Omelette rebuilt? Probably '42 or '3, after the fire.

Q. You have been going in there since 1942 or '43?
A. Since before then.
Q. Before then?
A. Yes.
Q. Do you always drink Scotch or Scotch Mist?
A. Yes, when I do.
Q. Do you know why Mr. Frelier would say that you had had Stingers?

Mr. DiMaria: What is that question?

A. No, I don't know why he said that.

Mr. DiMaria: Just a moment. What is that question?
Mr. Feeley: Do you know why Mr. Frelier said you had Stingers?
Mr. DiMaria: I object to that, Your Honor. There is no evidence at all Mr. Frelier said he had Stingers. It is a prejudicial question. Are you talking about whether Mr. Weaver had Stingers?
Mr. Feeley: Yes.
Mr. DiMaria: These is no evidence that Mr. Weaver had Stingers.
Mr. Feeley: Your Honor, I believe right into the record [fol. 159] on impeachment of Mr. Frelier on cross examination, his testimony at the prior trial.
Counsel, I will refer you to line 23 of page 22.
Mr. DiMaria: Would you read that in evidence?
Mr. Feeley (Reading): "Did you have trouble with him?

"A. No, there were a few of his friends and he was with Doctor Weaver. He had two Stingers over a two-hour period. I didn't know he had that much."

Mr. DiMaria: And I submit Mr. Frelier was talking about Mr. Walton, not Mr. Weaver, and Mr. Feeley knows that.

By Mr. Feeley:

Q. What time did you say that was?

Mr. DiMaria: I object to the question first.
The Court: I think we are not asking for an answer to it now. I think what he is trying to do is lay a basis for it. We will reserve the ruling on the objection.
You may proceed, Mr. Feeley.

By Mr. Feeley:

Q. What time did you say you met him at the bar, sir?

A. Sometime between, probably between 8:00 and 9:00, I don't know, after dinner.

Q. Where had you been before going to the L'Omelette?

A. I had driven up to Los Altos to, presumably to keep this dinner engagement, only to find out I was a week ahead of time.

Q. You say you had these drinks at the bar?

A. After dinner.

[fol. 160] Q. With Mr. Walton you had these drinks at the bar?

A. Yes.

Q. You say that was 9:00?

A. Sometime between 8:30 or 9:30 or maybe closer to 10:00.

Q. You didn't meet Mr. Walton when you first came in?

A. No.

Q. Were you with him twice that evening, different occasions?

A. No, not that I know of—well, I sat down with him, I may have left, I didn't sit at the bar the whole hour or so that I was with him. I mean, I may have left the bar.

Mr. Feeley: I am sorry, I didn't hear you.

A. I may not have just stayed on the stool an hour, or an hour and a half, but I was there the bulk of the time. That is, we were there more or less together, various people came in, and we talked to various people, several people stopped.

Q. Could that have been around 5:00 or 6:00 o'clock?

A. No, it was not.

Q. Once again, you don't know why Mr. Frelier would say you met there around 5:00 or 6:00 o'clock?

A. I do not believe he said I was there at 5:00 or 6:00 o'clock.

Q. Was there anyone there with you and Mr. Walton?

A. Yes, various people dropped by. I mean that either Marvin or I or both of us knew.

Q. I see. Do you know Mr. Frelier very well, I assume?

A. I do.

[fol. 161] Q. You don't know why he would say you were there at 6:00 or 7:00 drinking with Mr. Walton?

Mr. DiMaria: I object, Your Honor; there is no evidence Mr. Frelier said Mr. Weaver came in at 6:00 or 7:00.

A. No, I wouldn't have any.

The Court: Just a minute.

Mr. Feeley: I will go through the same procedure as before, Your Honor. It was brought in on impeachment.

The Court: I don't see that this can be of tremendous importance. The objection is overruled; you may answer. Answer if you remember.

A. Do you mean, how do I know I was not there between 5:00 and 7:00?

By Mr. Feeley:

Q. No. You don't know why Mr. Frelier would say you were there at that time?

A. I know I have no idea. I don't know how accurately he keeps time, he has a lot of other things to do.

Q. When were you requested to testify, sir?

A. Two days ago.

Q. Your memory goes way back to May 8 of 1953?

A. That is the last time I have seen Marv. Yes, it does.

Mr. Feeley: I have no other questions.

The Court: You may step down, Mr. Weaver. Thank you.

(Witness excused.)

Colloquy Between Court, Counsel and Jury

Mr. DiMaria: At this time, Your Honor, I would [fol. 162] like to introduce the deposition which was taken before this Court, of Mr. Dale Smith, into evidence. I think you have a certified copy of that, haven't you, from the Court Reporter?

The Court: I have the original, I think.

Mr. DiMaria: If I may submit the original in evidence, I may retain this, and I would like to have at least portions of the direct examination read to the jury.

The Court: Suppose we take—the next thing is, of course, the argument.

Mr. DiMaria: If I may, Your Honor—excuse me. At this time, for the record, I would like to request the instructions that I have already submitted to Your Honor.

The Court: If you just hold on for a minute, we can handle that so there won't be any possibility of any prejudice or anything going haywire. I am going to try to estimate the amount of time because if it is going to take more than a reasonable length of time, I am not going to ask this jury to stay. On the other hand, if we can finish it within a reasonably short time, and the jury is willing, it may be that they would rather stay and finish it today than come back, but I am going to leave that as a free choice to the jurors.

The Court: What I am asking now is, what is the approximate time that you think you want by way of summarizing?

Mr. Feeley: Your Honor, I am willing to do this; waive opening argument. However, reserving any right to [fol. 163] cover what I wish, to at least save that amount of time.

The Court: How long do you think you want for argument?

Mr. DiMaria: I realize it is late and none of us want to be here.

The Court: Tell me how much time you think you are going to have to have, because I want to address myself to the jury here and give them a free choice of what they want to do.

Mr. DiMaria: I will limit argument to 15 minutes.

The Court: And you?

Mr. Feeley: I was thinking 15 minutes of very fast argument?

Mr. DiMaria: Why not give me a little leeway, 15 or 20 minutes?

The Court: Suppose we say 20 minutes. You would want at least that much time, perhaps more.

Mr. Feeley: Yes, Your Honor.

The Court: That would be 50 minutes, I suppose the

Charge would take another 15 minutes. That is an hour, 15 minutes. That is the minimum, is that right?

Ladies and Gentlemen of the jury, this is kind of informal and off the record, but what we are faced with here is a situation where counsel will probably want to take almost an hour between them, maybe less, 20 minutes on one side and 30 on the other would be 50, and then the Court's [fol. 164] instructions probably take 10, 15 minutes for a total of an hour and 15 minutes from now before the case would be submitted to you. That means before you would begin your consideration of arriving at the verdict. Now, I don't know how much time—there is no way of estimating how much time you may want to deliberate, and of course that is entirely up to you so long as you are satisfied with your verdict, but the prospect is that you will be here at least two hours. Now, would you prefer to come back tomorrow, or would you stay the two hours? We can take a ten-minute recess so you can call home if you want to and let the people know what the situation is at home. Now, which would you rather do, come back tomorrow, or finish it up?

A Juror: Let's finish tonight.

The Court: All right, then. Shall we take a ten-minute recess so those of you who wish can call home and let people know that you are going to stay?

A Juror: Fine.

The Court: All right. We will take a ten-minute recess.

(Whereupon, a short recess was taken, after which the following proceedings were had:)

The Court: Let the record show that the jury is all present and the Defendant and counsel.

You may proceed, Mr. DiMaria.

[fol. 165] ORAL ARGUMENTS ON BEHALF OF THE DEFENDANT

Mr. DiMaria: Ladies and Gentlemen of the jury, I have just a few brief moments here, because of circumstances, to point out the highlights in the evidence, which I will feel sure will prevent you from feeling, beyond a reasonable

cates Mr. Bradford had discussed the matter, because .24 is much too particular, it is much too specific a point to stop at. I doubt that Mr. Bradford had any particular cases that were generalized in that way, at .24 exactly. There is another thing I would like to bring out, and that is the blood test was taken—the blood sample was taken on May 8, and the actual analysis was made on May 12. Now, from all [fol. 167] the testimony that has been deduced here by Mr. Walton, or on behalf of Mr. Walton, the supposition that Mr. Walton had 13 or 14 drinks, or that his blood count was .24 just does not square with the facts, they are completely inconsistent, much too much, too far apart. So something is wrong. Either you have got to say that every witness that Mr. Walton has produced is not telling the truth, or that this test is not accurate, or I may add that the actual blood sample that showed .24 wasn't the sample taken from Mr. Walton. There is a four-day break in there and .24 does not coincide with the testimony of Mr. Frelier, Mr. Weaver, Mrs Taylor, nor does it coincide, I might add, with the testimony of Mr. Shannon. Mr. Shannon, the officer, testified that Mr. Walton was not dizzy, delirious, he was not dazed, he was not dejected. .24 would have put Mr. Walton in a class with all of those. That is not the case. Mr. Walton's conversation, when he did speak, there was no evidence whatsoever that it was fuzzy, incoherent. There is no evidence that he didn't speak clearly. The only evidence of drunkenness that we had is Mr. Hamre, who took notes of odor of alcohol. He didn't see—when he did see, yes, Mr. Hamre stated he saw Mr. Walton get up, but he doesn't remember him walking away, and he doesn't remember anything unusual about Mr. Walton's walking, whether he lurched or staggered. The only evidence we have that Mr. Walton, outside of this blood test, that Mr. Walton was under the influence of alcohol is Mr. Shannon's testimony that he [fol. 168] staggered. Yet we have Mr. Frelier who says, "No, he didn't." We have Mrs. Taylor who says, "No." We have Mr. Weaver who says, "No, perfectly normal." All of them—that is, I might say, Mr. Walton was perfectly normal, not that his behavior was normal, but he was his normal self when he had no alcohol at all in his system.

Mr. Frelier testified he was the only one who served drinks to Mr. Walton that evening, and he served one beer and three Stingers. Mr. Walton testified to the same. Mr. Frelier testified that when he saw Mr. Walton he was not under the influence of alcohol and if he had been, he would have brought that to Mr. Walton's attention, he has never had to yet. He testified Mr. Walton is not a drunk. He has spent whole evenings at L'Omelette and had nothing more than Calso water with lime. This particular evening he had dinner there and he left, admittedly 10:00 o'clock is an early time to leave a night club if you are there for a drinking bout. Generally, if it is a drinking bout, an individual leaves about 2:00, if he is there to drink. Mr. Frelier testified, too, that he saw Mr. Walton at the jail between 12:00 and 1:00. Mr. Walton was perfectly sober; Mr. Walton wrote out the check here which you will see when you go into the jury room, and you will notice, if I may request, that his handwriting—notice also the other checks that he has written and see if you can notice any difference. Notice, if you would, whether this $290 check, which Mr. Walton, without prompting, paid, dated [fol. 169] May 9, shortly after midnight, indicates that he wasn't .24.

That Mr. Walton made this check out immediately after Mr. Frelier paid his bail, and if you will notice these other checks and compare the handwriting and see if there is any obvious measurable loss of manual dexterity that Mr. Bradford said there would be in the case of .24.

Now, Mr. Frelier testified that Mr. Walton left the jail under his own power. We have the testimony of Mrs. Taylor, Mrs. Wanda Taylor—she testified she saw Mr. Walton leaving, no personal interest in the matter, and she testified he was perfectly sober, perfectly normal. Mr. Weaver says he knew Mr. Walton for a long, long time, chatted with him for one hour shortly before he left. Nothing to indicate that Mr. Walton was under the influence of alcohol, nothing.

Those men testified under oath, under the penalties of perjury. Mr. Weaver has no interest in this case. He taught Mr. Walton at J.C., Menlo J.C., and hasn't seen him

since May 8, 1953. Not a good friend, but he is willing to come here and testify as to what he knows.

Now, I would like to bring up the question here of the testimony of Mr. Walton relative to his being forced to give a blood test, and I think that should be considered very seriously by this jury, because it is the beginning of the police state. It is brutal and shocking conduct on the part of officers to inject a needle into a person and withdraw [fol. 170] blood. If we permit that, it is the next step to inserting a needle and injecting some truth serum. It is the next step to permitting the Soviet police state to get anything, brain-washing is next; get anything you want from—not an accused—let's call him the victim. And that is something I think that this jury should not condone, should stop it dead in its tracks. It is not American.

Now, there is another thing. The question may come up as to whether it was taken against his will. Testimony is without contradiction that right up to the blood test Mr. Walton was belligerent, not cooperative, refused to answer questions except the few brought out and he was still belligerent after the blood test. Is it logical that he would refuse to answer questions, that he would refuse to walk a line, take any test, yet permit the insertion of a needle into his arm to take a blood test? I submit it isn't. And I submit the blood sample was taken from Mr. Walton without his consent, despite his protest and by force.

There is one other thing I think this jury should consider, and I appealed to you in the impaneling of the jury, that Mr. Walton should be given a fair trial and I am sure that you will take into consideration, merely because he is the owner of a sports car should not mean that he should be discriminated against, and I submit that the evidence shows that the police do discriminate against the owners of a sport car, they single them out. Admittedly, some drivers of [fol. 171] sports cars may be speed artists, and Mr. Feeley tried to bring that out—how fast had Mr. Walton driven his vehicle, but that doesn't mean that all owners of sports cars are speed demons, or under the influence of alcohol. A sports car is not a hot rod, it is a vehicle that is driven by many an elderly man and respectable man and driven in the right manner.

How much time do I have, Your Honor?

The Court: Five minutes.

Mr. DiMaria: Last Saturday morning, through the gracious consent of Mr. Feeley and Judge Bowen, we took a deposition of Mr. Dale Smith, who is unable to appear here today to testify, because he has gone back east on a business trip, and I would like to read a portion of that deposition to you, the questions that I asked Mr. Smith—now, I am asking these questions:

"Q. What is your full name, Mr. Smith?" He said, "Dale Smith, first initial is T. Thomas, I don't use that.

"Q. What is your address?

"A. 338 Atherton Avenue, Atherton.

"Q. What is your occupation?

"A. I am a partner of Rucker-Fuller.

"Q. Now, you have been given to understand that the case of People versus Walton will be held April 7, 1954; is that correct?

[fol. 172] "A. That is correct.

"Q. Where will you be?

"A. At Muskeegon, Michigan.

"Q. Is that on company business?

"A. Yes.

"Q. Not on a vacation trip?

"A. No.

"Q. When will you be back?

"A. Friday night.

"Q. Well, is that March 9?

"A. Yes.

"Q. Now, on the 8th of May, 1953, where were you?" He said, "Mrs. Smith and I had dinner at L'Omelette."

"Q. And did you see Mr. Walton on that evening?" He said, "Yes, I did."

"Q. And did you see Mr. Walton leaving L'Omelette?

"A. Yes.

"Q. That evening?

"A. Yes, I did.

"Q. And approximately what time was that?

"A. I would say a bit late in the evening, 11:00, 10:00 or 11:00 o'clock.

"Q. 10:00 or 11:00 o'clock?

"A. Yes.

"Q. Now, at the time you saw Mr. Walton leave, would you tell us whether he was under the influence of alcoholic beverages, in your opinion?" and the answer is, "In my opinion, he was not."

"Q. Would you say he was sober?

"A. I would say so.

"Q. Now, was his speech thick?

"A. No.

"Q. Or any different than from the times that you have [fol. 173] spoken to him, at other times?

"A. No.

"Q. Were his eyes in any other condition than normal?

"A. I thought they were normal, as far as I was concerned.

"Q. Was his manner of walking—was he staggering or anything like that?

"A. No, sir.

"Q. Perfectly steady, normal walk?

"A. That is right. I did not observe any intoxication.

"Q. No indication whatsoever?

"A. No, sir."

And I stated at that time I had no further questions. The Court then said, "Mr. Feeley, you may go ahead." I presume Mr. Feeley will carry on from there.

The Court: All right, Mr. Feeley, you may proceed.

Closing Argument on Behalf of People

Mr. Feeley: Ladies and Gentlemen, ordinarily I have the right to argue first and then counsel for the Defendant, and then I have the right to answer. For the sake of time, however, I will try to be brief as far as this last matter.

The testimony of Mr. Smith, which was taken here on Saturday morning of last week, is in evidence, and I won't take time with it, but I hope you do read it when you go into the jury room. You won't have the opportunity, or didn't have the opportunity of seeing him as a witness, but

I am sure you can picture him as a witness from the cross examination. All I ask is that you read it.

Now, I will primarily concern myself with just the [fol. 174] statements made by counsel here. First of all, I would like to point out that in this charge, which is a charge of driving a vehicle while under the influence of intoxicating liquor, there are only three elements to the particular charge:

(1) That Mr. Walton was driving a vehicle, which he does not deny.

(2) On a highway, and the El Camino is a highway, and

(3) While under the influence of intoxicating liquor.

Those are the only three elements. The charge does not require an accident, or anything of that nature. When you get into that field, you are getting into other violations, so if you will bear in mind those are the only three elements to this particular offense. Now, I believe I can state here you really only have one element to consider, and that element is, was he, or was he not, under the influence of intoxicating liquor at the time he was driving that vehicle. By his own testimony, he told you he was driving; he was driving on the El Camino. So forget about those two elements, and as a matter of fact, he told you he was drinking. So there is only one question for you to consider in that regard. Now, in considering that, you should consider all of the evidence. The law doesn't require more than one witness, as such, to prove any kind of a case, but ordinarily, to make sure all elements are covered, you ordinarily have more than one witness.

[fol. 175] Now, the first witness in this particular case was Officer Shannon, who related that he was on routine patrol with Officer Daly, who, unfortunately, could not be here today, and his attention was called to Mr. Walton's vehicle around 10:00 o'clock, or shortly thereafter, by the manner in which it was being driven. Mr. Daly told you—I mean Mr. Shannon told you that he was traveling in the middle lane, there was one vehicle ahead of him at the time Mr. Walton pulled out onto the highway at an angle. He said he saw him veer from the middle lane at the obstruction—for the moment I can't think of the word—at Fer-

ranti's, on the highway. At any rate, Mr. Shannon said he had to attain the speed of 65 miles an hour and pull across the double line, avoiding traffic, to get behind Mr. Walton, and he said that he had followed him for approximately one-half mile until he was stopped, at roughly 60 to 65 miles an hour.

Now, as far as alcohol is concerned, alcohol affects drivers in different ways. I believe you know that as well as I do. One person may become overly cautious when he drinks too much. He may be a hazard on the highway because he is going too slow; another person may weave all over the highway; another person may drive too fast. Now, Mr. Walton happens to be in that class where they drive too fast. Now, as you know, I assume that you know, if any of you have ever had anything to drink at all, one [fol. 176] of the first things you lose with alcohol are your inhibitions. The usual person will become more talkative, for example. He may become gay; another type person may become belligerent and want to fight everyone. At any rate, the average, normal person will lose whatever inhibitions he may have, and one inhibition is to obey the traffic laws, speed laws. Now, ordinarily, a person who has had enough to drink may feel he is more or less floating on air and he just scoots down the highway. Now, that is the type of driver that is most dangerous; it is not the stupefied drunk; ordinarily they don't get even that far. They don't even get to a vehicle. If they do, they can't drive the car. The ordinary case that causes accidents is of Mr. Walton's, that is the average case. Now, you don't see these things from day to day. You may occasionally note it in the paper. You note there is an accident where someone was arrested for 502, but you don't pay any particular attention. You don't realize that it is a common, daily problem with law enforcement. As a matter of fact, it is the biggest problem there is in law enforcement. Now, I am not here to argue that there is anything against the use of alcohol, I use it as well as any one of you, perhaps, but when we associate alcohol and driving, that is where we run into the problem.

At any rate, Mr. Shannon, Officer Shannon, related what he did—what happened at the scene. Now, a few little

things that he wasn't there for Officer Daly did. Unfortu- [fol. 177] nately, as I say, we don't have Officer Daly here, and Mr. Shannon could not testify to. At any rate, he related for the sake of time, I am sure you remember as well as I do, about the driver's license, about his failure to give his name and address, or anything of that nature. Then, at the accident——

Mr. DiMaria: Just a moment. Did you say there was an accident? I don't think there is any mention of accident.

Mr. Feeley: No, there was nothing of that nature. I will skip over most of this. At any rate, at the Accident Bureau at San Jose he was again requested—in evidence here you have this form which is filled out in every case such as this, not only by the Highway Patrol, but by any police agency in Santa Clara County. They are routine questions you can look at in the jury room without my going into that, and also they note whatever they saw, or how the particular person reacted to the tests that are ordinarily given, as you will see from noting that he failed to answer any questions other than the first two or three. From his own testimony he refused to take the balance and coordination tests.

Now, he said he was forced to give blood. The only thing I ask is that you be reasonable people. I would like to see how anyone could force you or me or anyone else to take our blood. As a matter of fact, it doesn't make any difference to us whether they do or do not give blood, [fol. 178] because when they don't give blood, it only indicates to us that they are trying to cover up the amount of alcohol they have had to drink. So, we end up with the blood sample being tested. It was found to contain .24, 24/100 of 1 per cent. Now, the blood samples are used for all kinds of things. If that particular figure bothers you, .24, it sounds like a fairly small figure, 24/100 of 1 percent, but in relation to blood it is not. For example, the appendix. They take a small sample of your blood and determine whether you need an operation. Well, as here, it only takes a certain percentage present. As he has indicated, they transpose that over into the amount of alcohol actually consumed. Now, there is no other way for that alcohol to get into the blood. You have to drink it.

Now, we come down here. This is very reasonable; there is nothing complicated about it. First we have no drinking; there is no alcohol in the system; .05 there is no outward effect, as Mr. Bradford—that would be roughly two ounces of 100 proof alcohol, or say, two drinks. Now, the average person is not affected by two drinks, you know that as well as I do, and you get up to three drinks and beyond, depending upon the particular individual. It may or may not affect him. At any rate, at .10, regardless of a person's drinking habits, he is under the influence of intoxicating liquor. That means that at least that amount of 100 proof alcohol, or whisky, has entered his blood [fol. 179] stream and, for example, if you are drinking and eating, you know very well you can drink more. It doesn't affect you in the same way as it would, for example, if you took a few shots as soon as you got up in the morning. That might knock you out right away because it goes directly to your blood. There is nothing in your stomach or digestive tract to keep it from going directly through the walls of the stomach and intestines. At any rate, he has told you these were the first things that were measurably seen; reactions of eyes to light, behavior changes—I like to think of that as inhibitions, visual acuity, as Mr. Bradford expressed it, that is the ability to see to the side, peripheral objects—that is the first thing generally affected as far as your vision is concerned; reaction time would pertain to your ability to react to a given situation on the highway. Say a car in front of you stopped suddenly, well, if your reaction time is off, you might hit him in the rear. Manual desterity is just your physical ability to do skilled tests. Now, he related that from this point on everyone is under the influence of liquor. When you get up to .15, this is where the average person is intoxicated, the extreme is .24. Mr. Bradford related he had only seen one case where a man went to .24 without being drunk, as we properly consider that term, "drunk or intoxicated," and beyond that .33, tendency to coma, and .50, death. I believe that is more or less self-explanatory. As a matter of fact, I think he [fol. 180] really made a mistake here, this should have been 9 or 10 ounces in the system at the time. Mr. DiMaria brought in this case here, and I really don't see anything

different. "Delighted and devilish." I don't know whether that is a medical term, it is taken from this case here. Once again I would consider that inhibitions myself, .15 to .20, "dizzy and delirious," 20 to 30, "dazed and dejected"; 30 to 40, "dead drunk," and I believe Mr. Bradford explained we considered dead drunk to be either passed out or close to it, or on the verge. Then you have .40. You can be dead. So that is even more drastic than Mr. Bradford, and once again I point out from Mr. DiMaria's own citation here the ooncensus of the medical profession, that when the blood alcohol concentrate of the driver of an automobile is .15, such fact is conclusive evidence that the driver of the car is under the influence of alcohol. So even your American Medical Association considers this point here, that Mr. Bradford says is where the average person is intoxicated, they consider that point conclusive evidence in and of itself. Counsel has stated that it would be necessary for Mr. Walton to have imbibed 12 ounces, or on the 7/8 basis, 13 or 14. Maybe he did. I don't know how much he did drink. He at least had this much. He had that much in his system at the time and there is no other way for it to get into it. That is a direct measurement of the amount of alcohol in his system. He said that Mr. Bradford had been influenced by the fact that the blood alcohol percentage [fol. 181] in this particular case was .24 and therefore he used the figure .24 as the extreme. If that had been the case, counsel could have determined that by cross examination. He could have said, "On other cases, what was your testimony?" There was nothing like that brought out on cross examination.

The only other witness from the People was Mr. Hamre. Mr. Hamre works for the Central Medical Laboratory in San Jose, which is a laboratory used by the medical profession itself to take blood samples. They are licensed for that single purpose and as a matter of convenience and economy to the people, they are called in these cases rather than doctors because doctors are hard to obtain at unusual hours of the night, and because of the cost involved, they are only called for the purpose of taking the blood because they are licensed to do that. But he also noted that this man from his own observation was under the influence

of alcohol and he said his eyes were bloodshot and dilated, he refused to answer questions, his face flushed, his clothes disorderly; he had an alcoholic breath, and he said he was under the influence of alcohol. Now, as I say once again, all I ask is that you be reasonable.

You have seen people in various stages of intoxication, perhaps you have known a few individuals who, after a few drinks, they get a little giddy or gay or there are certain people after five or six drinks may begin to weave a little [fol. 182] bit, speech may become slurred. Understand, that the vast majority of people—these are extremes here —the vast majority of people react far before we get to these extremes.

How do you judge of intoxication? Perhaps picture a person walking in here now. He may walk in with his face flushed; his eyes bloodshot; he may be weaving; he may fall against a chair. You would say that person is drunk. That is from your own observation and experience. Now, that is all you have in this particular case, but you have that corroborated by the blood alcohol itself and everyone that saw the man, they are all disinterested. Mr. Hamre is a citizen as you are. He is not a law enforcement officer. He told you the man was under the influence of alcohol. Mr. Shannon is a public servant. That is what he is there for. If he didn't do that, you would want him removed from his position. He related what happened, he had never had occasion to meet the man before. I don't know what more could be expected in this type of a case.

Now, you consider the defense of this particular case. You have heard the evidence here as well as I. From Mr. Frelier on down—I don't think I need to comment on Mr. Frelier, or Wanda Taylor. Mr. Frelier speaks for himself. Wanda Taylor was the hostess employed there. In the first place, these people aren't going to come in here and say, "We serve people until they are drunk or intoxi- [fol. 183] cated." They are not going to come in and say, "We serve people until they are intoxicated; we serve drunks." But you know from your very experience that any one of these places has drunks or intoxicated people, not always perhaps, but from time to time. That is a matter of common knowledge. You know very well that every-

one that goes to L'Omelette, or Longbarn or any one of these restaurants are not automatically picked up. When they leave they are not charged with this violation. You know that the law is reasonably enforced, otherwise you and I and everyone else would be arrested, but you know that doesn't happen. Wanda Taylor, she said she saw him leave. He said, "Good night, take care of Mother." She, however, didn't seem to recall anything on cross examination from 5:00 to 10:00 p.m. He was at one location at the bar. What would you be doing if you were five hours at one spot at a bar? I mean, that is a reasonable interpretation. Maybe he had 15 drinks; I don't know how much he had. He didn't have dinner; she said, she didn't see him. She was requested to testify here last Sunday and her memory goes all the way back to May 8th of last year, and she remembers nothing else about him, and he has been in there practically every day since, if not before, and that applies to Mr. Frelier, and if you will note, it applies to this man also whose deposition was taken if you will read the cross examination.

Bear in mind also that they are friends of Mr. Walton. [fol. 184] He is a customer there, apparently a very good customer, and their testimony is certainly going to be colored. To say the least, they aren't impartial witnesses. The testimony of Mr. Walton who has a greater interest—who could possibly have a greater interest in the outcome of this case than Mr. Walton—he is not going to tell you anything damaging to himself if he can help it, but even there we arrive at a beer and three Stingers, and Mr. Frelier said he only had two Stingers. Then we had some other drink, I have forgotten just what that was—Alexanders—and as I say, you heard his testimony as well as I did in variance with his prior testimony in this particular case. You have Mr. Walton going 35 miles an hour. By his own testimony, "The police 20 to 30 feet behind me," he stated. When he saw it, he stopped, and that is in direct contradiction of the officer's testimony.

Now, the officer, as I say, they don't arrest everyone that comes out of L'Omelette—they have to do something to attract their attention—any more than they have arrested you or me or anyone else. This officer just didn't fly up

and decide to stop him for no reason at all, which is contradicted by the fact that he was intoxicated, as shown by the blood evidence.

You have just heard Mr. Walton's testimony this afternoon, so I don't think I need to go through all of that. He said the officer was domineering and he had to go through [fol. 185] a gymnastic maneuver at the scene. Now, what it was I don't know, and something about using the expression "Mother" as being asinine. Whether it was asinine or whether he was drunk or intoxicated, that is for you to determine. To my mind he was intoxicated. As far as his being fairly treated, he stated on direct testimony, "They did not do a thing to me. I was not manhandled in any way." He was allowed to phone 10 minutes after being booked, and I don't know what more you can ask of any law enforcement agency. He has been fairly treated at every stage of the proceedings and then he brought up the fact that he had been cited frequently as a sport car driver. By his last testimony, when he was in this court, he wasn't cited. Maybe Mr. Walton is just one of those drivers—I can't determine that for you. The only other witness here was Mr. Weaver. On direct examination he ran into him at the bar at L'Omelette, didn't know how long he was there with the Defendant, a half hour to an hour. The time could have been from 8:00 to 9:30. Subject of conversation was Mr. Walton's trip to Europe and his automobile or car. He said he wasn't under the influence of alcohol, didn't recall himself what he had been drinking that night, whether it was Scotch or Scotch Mist. He said probably—he had no idea where he had last ordered that drink, whether it was at L'Omelette or any place else. There were no Stingers or Alexanders. He probably had one or two drinks with Marvin, hadn't had a drink with Marvin [fol. 186] before he met him at the bar. Also is a friend of Pierre Frelier, he has been going there since some time, I believe, before 1941, or '42—I didn't get the date. He was requested to testify here within the last week or so. I didn't get that date. On something that had happened on May 8th of last year—and this, gentlemen, you also will note is a great friend.

Now, this is a group of friends. I am not prejudiced,

more than anyone else. I am sorry if I have taken too long, and thank you very, very much for your cooperation.

The Court: Now, for the last time, probably, in this case, the Court has occasion to give the jury some [fol. 188] choice here. The next step in the procedure would be for the Court to give you the instructions which you are to use in arriving at your verdict. That will take possibly 12 or 15 minutes. Would you prefer for me to go ahead with that now, or would you rather have a five-minute recess, and then have those instructions and sit right in this room and deliberate the case? Would you rather have a five-minute recess at this time, or do you want to go right through?

A Juror: Can we smoke while deliberating?

The Court: Yes. Then I take it everyone would like to go ahead?

A Juror: Yes.

Mr. DiMaria: Your Honor, for the record, I would like to state that I have submitted to the Court 11 instructions on behalf of the Defendant. I again submit them to the Court to be read to the jury.

The Court: You don't have to say that to the Court. It is a matter of record.

Mr. DiMaria: Yes.

INSTRUCTIONS TO THE JURY BY THE COURT

The Court: Ladies and Gentlemen of the Jury, I think you will appreciate from how this case has progressed that counsel have both been pretty square about trying to save time and expedite the treatment of the case, so as not to drag it out any further than possible. We were a little slow in getting started, but I think, as you have observed, [fol. 189] it has progressed reasonably fast since, and with cooperation of the attorneys on each side.

Now, at this time, of course, that admonition which the Court gave you at the outset will be removed upon the close of the instructions. When you come to consult among yourselves in the jury room, you are expected to discuss this matter freely among yourselves; up to the time that

the case is finally submitted to you, the admonition heretofore given will hold.

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against either party to the cause. It is the duty of the jurors to deliberate and consult with a view to reaching an agreement, if they can do so without violence to their individual judgment, on the evidence under the instructions of the Court. Each juror must decide the case for himself, but should do so only after a consideration of the case with his fellow jurors, and he should not hesitate to change his views or opinions on the case when convinced that they are erroneous. No juror should vote for either party, nor be influenced in so voting, for the single reason that a majority of the jurors should be in favor of such party. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict solely because of the opinion of the other jurors.
[fol. 190] In considering the evidence in this case, and in arriving at a verdict thereon, you must not act upon or be influenced in the slightest degree by any outside influence, pressure or report, if any have come to your notice. All extraneous matters, statements, or suggestions should be carefully and conscientiously discarded by you, and you should base your verdict solely upon the evidence produced and received in the trial of this cause, bearing in mind throughout the discharge of your obligations as jurors the instructions and the admonitions of the Court as to all matters of law.

Now, the attitude and the conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is fallacious. Remember that you are not partisans or advocates, but rather judges. The final test of the quality of your service will lie in the verdict which you return to the Court, not in the opinions any of you may hold as you retire. Have

in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end, the Court reminds [fol. 191] you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

The Court instructs you that you are the sole and exclusive judges of the weight of evidence in this case and credibility of the witnesses who have testified, and it is your function to determine all questions of fact arising from the evidence in the case.

But while you are the sole and exclusive judges of the facts and of the weight of evidence, you are to judge the facts upon the testimony and other evidence produced here in Court. If any evidence has been admitted and afterwards stricken out, you must disregard the matter so stricken out entirely; and if any counsel has intimated by questions which the Court has not permitted to be answered, that certain things are or are not true, you must disregard such questions and refrain from any inference based upon them. If counsel, upon either side, have made any statements in your presence concerning the facts of the case, you must be careful not to regard such statements as evidence, and must look entirely to the proof in ascertaining what the facts are. If either party has during the trial admitted any fact or facts material to the matters involved in this case, such admission is to be deemed by you as proven against the party making such admission.

The Court instructs you that while you are the sole [fol. 192] and exclusive judges of the facts and of the weight of the evidence, you are to judge of the facts upon the testimony and other evidence produced here in court. The law does not require demonstration, that is, such a degree of proof as excluding the possibility of error produces absolute certainty, because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind.

Now, if the evidence points equally strongly to the guilt and the innocence of the Defendant, it is your duty to adopt that view of the evidence pointing to his innocence and to acquit him.

This rule of law is made applicable to cases in which there are two opposing interpretations, each of which appears to you to be reasonable, but it does not apply in a case where there are two opposing constructions sought to be placed upon the evidence, one of which appears to you to be reasonable and the other appears to be unreasonable. In the latter case it would be your duty under the law to adopt the reasonable construction and reject the one which in your judgment appears to be unreasonable.

The Court instructs you that you are the sole and exclusive judges of the effect and value or weight of evidence addressed to you and of the credibility of the witnesses who have testified in this case, and the character of the witnesses as shown by the evidence should be taken [fol. 193] into consideration for the purpose of determining their credibility and the facts as to whether they have spoken the truth. You may scrutinize, not only the manner of the witnesses while on the stand, their relation to the case, if any, but also their degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties, by the character of his testimony or by evidence affecting his character for truth, honesty or integrity, or by contradictory evidence, and you are the sole and exclusive judges of his credibility.

A witness willfully false in one material part of his or her testimony is to be distrusted in others; that is to say, the jury may reject the whole of the testimony of a witness who has willfully sworn falsely as to a material poimt; and the jury, being convinced that a witness has stated what was untrue, as to a material point, not as a result of mistake or inadvertence, but willfully and with the design to deceive, may treat all of his or her testimony with distrust and suspicion, and reject all, unless they shall be convinced that he or she has in other particulars sworn to the truth.

The Court instructs you that a Defendant in a criminal action is presumed to be innocent until the [fol. 194] contrary is proven; and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal; but the effect of this presumption is

only to place upon the State the burden of proving him guilty beyond a reasonable doubt.

Reasonable doubt is defined as follows: "It is not a mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."

Now, as stated at the outset, this particular case is a case involving a charge of a violation of Section 502 of the Vehicle Code relating to driving an automobile while under the influence of intoxicating liquor; and in that connection you are instructed further that it is unlawful for any person who is under the influence of intoxicating liquor to drive a vehicle upon any highway.

To constitute a violation of Section 502 of the Vehicle Code, it is not necessary that the driver be "drunk" or "intoxicated," as the section merely provides that such driver shall be "under the influence of intoxicating liquor."

If intoxicating liquor has so far affected his nervous system, brain or muscles as to impair to an ap- [fol. 195] preciable degree his ability to operate the vehicle in a manner like that of an ordinarily prudent and conscientious man in the full possession of his faculties, using reasonable care and under like conditions, then such driver is under the influence of intoxicating liquor within the meaning of the statute.

Duly-qualified experts may give their opinion on questions in controversy at the trial. To assist in deciding such questions, you may consider the opinion, with the reasons stated therefor, if any, by the expert who gives the opinion. You are not bound to accept the opinion of an expert as conclusive, but you should give it the weight to which you shall find it to be entitled. You may disregard any such opinion if you find it to be unreasonable.

In arriving at a verdict in this case, the subject of penalty or punishment is not to be discussed or considered by you, as that matter is one that lies solely with the Court

and must not in any way affect your decision as to the innocence or guilt of the Defendant.

Upon retiring to the jury room, you will select one of your fellow jurors to act as foreman, who will preside over your deliberations and who will sign the verdict to which you agree. In order to return a verdict, it is necessary that all 12 of the jurors agree to the decision. As soon as all of you have agreed upon a verdict, you shall have it signed and dated by your foreman and then return [fol. 196] with it to this room.

Now, that last one is what we call a formal instruction. Actually, you are going to stay right in this room and the rest of us will get out. Now, we are going to leave with you the exhibits which were received in evidence. That is, the People's Exhibits 1 and 2 and the Defendant's Exhibits No. 1 and 2-A to D, inclusive; and the deposition which was taken and referred to by both counsel, those will be left here. Also two blank verdicts, either of which you may use, but, of course, not both. One says that, "We, the jury in the above-entitled case, find the Defendant not guilty as charged in the complaint." The other says, "We, the jury in the above-entitled case, find the Defendant guilty as charged in the complaint." Whichever is your verdict is the one you will have signed by the foreman. The Bailiff here will have pencils and scratch pads and other things for your convenience, and I would like to ask at this time whether there is anything further that you want.

Mr. Feeley: No.

The Court: I mean your exceptions are O.K.?

Mr. DiMaria: On the instructions, you mean?

The Court: Yes.

Mr. DiMaria: I take exception to them, Your Honor.

The Court: All right. Mr. Bailiff, will you come up and take the oath.

(Whereupon, the Bailiff was duly sworn to take [fol. 197] charge of the jury.)

The Bailiff: Your Honor, the jury has reached a verdict.

The Court: Very well, Mr. Bailiff. We will return to the courtroom.

Has the jury reached a verdict?

Foreman Alexander: Yes, Your Honor.

The Court: Are you the Foreman?

Foreman Alexander: I am.

The Court: Will you hand the verdict to the Bailiff, please?

(Reading): "We, the jury in the above-entitled case, find the Defendant guilty as charged in the complaint. Signed: Elizabeth W. Alexander, Foreman."

Would you like to have the jury polled?

Mr. DiMaria: Yes, Your Honor.

The Court: Ladies and Gentlemen of the jury, in order to save a little time, I am going to ask the question just once, but it is actually directed to each of you individually, and the question is: Is this verdict your individual verdict? I will start with No. 1 and go right down the line, and if you will please answer "Yes" or "No" as I call your names—Mr. Russell?

A. Yes, sir.

The Court: Mr. Dean Turner?

A. Yes, sir.

Q. Mrs. Kehl?

A. Yes.

[fol. 198] Q. Mr. Nichols?

A. Yes, sir.

Q. Mr. Cole?

A. Yes, sir.

Q. Mr. Cate?

A. Yes, sir.

Q. Mr. Leitch?

A. Yes, sir.

Q. Mrs. Jackson?

A. Yes, sir.

Q. Mr. Thrash?

A. Yes, sir.

Q. Mrs. Paul Conklin?
A. Yes, sir.
Q. Mrs. McCord?
A. Yes, sir.
Q. Mrs. Alexander?
A. Yes, sir.

The Court: Ladies and Gentlemen of the jury, the Court appreciates very much your special cooperation in this case, being willing to stay over as you have. This ends the case so far as your duties are concerned, and I am sure that you gave it the very best attention you could.

In due course, now, you will receive through the mail a check for the fee which is set by law at $3.00, and your mileage. It isn't, of course, adequate, as you probably all feel, but part of your compensation, I hope, you will feel is derived from the fact that first you have realized, and know, that you have discharged your duties as citizens; and second, perhaps, that you have at least for the first time may have found out just how our system works and feel that you have had a part in it. So you are now excused, and thank you very much.

(Whereupon, the jury was excused.)

The Court: What do you want to do about the time [fol. 199] of sentencing; shall we put it over a few days, or what would you like?

Mr. DiMaria: Would the 12th be all right, Your Honor?

The Court: Whatever time you select. I imagine that is agreeable to everybody; you have no objection to it going over to the 12th?

Mr. Feeley: No.

Mr. DiMaria: All right, Your Honor, what time?

The Court: This is a Palo Alto case, isn't it?

Mr. DiMaria: Yes. Why don't we have it there if we could?

The Court: We will have it at Palo Alto at 9:00 o'clock on the 12th. That is next Monday.

(Whereupon, at 8:00 o'clock p.m., court adjourned.)

[fol. 200] INSTRUCTIONS REQUESTED BY THE PEOPLE AND GIVEN AS MODIFIED BY THE COURT

V

The court instructs you that you are the sole and exclusive judges of the weight of evidence in this case and the credibility of the witnesses who have testified, and it is your function to determine all questions of fact arising from the evidence in the case.

But while you are the sole and exclusive judges of the facts and of the weight of evidence, you are to judge the facts upon the testimony and other evidence produced here in court. If any evidence has been admitted and afterwards stricken out, you must disregard the matter so stricken out entirely; and if any counsel has intimated by questions which the Court has not permitted to be answered that certain things are or are not true, you must disregard such questions and refrain from any inference based upon them. If counsel, upon either side, have made any statements in your presence concerning the facts of the case, you must be careful not to disregard such statements as evidence and must look entirely to the proof in ascertaining what the facts are.

(If, however, counsel have stipulated or agreed to certain facts, you are to regard the facts so stipulated to as being conclusively proven.)

If either party has during the trial admitted any [fol. 201] fact or facts material to the matters involved in this case, such admission is to be deemed by you as proven against the party making such admission.

[fol. 202] INSTRUCTIONS REQUESTED BY DEFENDANT AND REFUSED BY THE COURT

I

Ladies and Gentlemen of the jury: It becomes my duty as Judge to instruct you concerning the law applicable to this case, and it is your duty as jurors to follow the law as I shall state it to you.

The function of the jury is to try the issues of fact that are presented by the allegations in the Complaint filed in this court and the Defendant's plea of "Not Guilty." This duty you should perform uninfluenced by pity for the Defendant or by passion or prejudice against him. You must not suffer yourselves to be biased against the Defendant because he has been arrested for this offense, or because a Complaint has been filed against him, or because he has been brought before the Court to stand trial. None of these facts is evidence of his guilt, and you are not permitted to infer or to speculate from any or all of them that he is more likely to be guilty than innocent.

You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the Defendant have a right to demand, and they do demand and expect, that you will conscientiously and dispassionately consider and weigh the evidence and apply the law of the case, and that [fol. 203] you will reach a just verdict, regardless of what the consequences of that verdict may be. That verdict must express the individual opinion of each juror.

II

A Defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the State the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because

everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt. It is that stage of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

III

The jury are the sole and exclusive judges of the effect and value of the evidence addressed to them and of the credibility of the witnesses who have testified in the case. The character of the witnesses, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility, whether or not they have spoken the truth. The jury may scrutinize the manner of [fol. 204] witnesses while on the stand, and may consider their relation to the case, if any, and also their degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties; by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or by contradictory evidence. A witness may be impeached also by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the cause on trial.

A witness willfully false in one material part of his or her testimony is to be distrusted in others. The jury may reject the whole of the testimony of a witness who has willfully sworn falsely as to a material point; if you are convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence, but willfully and with the design to deceive, then you may treat all of his or her testimony with distrust and suspicion, and reject all unless you shall be convinced that he or she has in other particulars sworn to the truth.

IV

The People and the Defendant are entitled to the individual opinion of each juror on the issues of fact in this case. It is the duty of each of you to consider and weigh [fol. 205] all the evidence in the case, and from such evidence to determine, if possible, the question of the guilt or innocence of the Defendant. When you have so determined that question, you should not be influenced in giving your verdict by the mere fact that one or more, or all of your fellow jurors may have reached a different conclusion. If, after careful consideration of all the evidence, your mind is fairly made up, and you are convinced beyond all reasonable doubt that you are right, it is your duty to stand by your decision. Each juror should freely and fairly discuss with his fellow jurors the evidence and the deductions to be justly drawn therefrom. If, after such a full and fair discussion, any juror is still satisfied that his decision is right, he should show so by his verdict. If, on the other hand, after such full and fair discussion, any juror is satisfied that his original decision was wrong, he should unhesitatingly abandon such decision, and render his verdict according to such final decision.

V

A Defendant in a criminal action is never required or expected to prove he is innocent, but the burden is on the prosecution to prove the Defendant guilty of the crime with which he is charged, beyond a reasonable doubt and to a moral certainty. If you cannot say, after a careful consideration of all of the evidence in this case, that the guilt of the Defendant has hereby been established beyond a [fol. 206] reasonable doubt and to a moral certainty, it is your duty to acquit the Defendant.

VII

The Defendant is charged with violating Section 502 of the Vehicle Code, which provides that it is unlawful for any person who is under the influence of intoxicating liquor to drive a vehicle upon any highway.

To constitute a violation of Section 502 of the Vehicle Code, the driver of a vehicle need not be "drunk" or "intoxicated" in the sense denoted by those words in common usage, but his nervous system, brain, or muscles must be so far affected by intoxicating liquor as to impair to an appreciable degree his ability to operate the vehicle in a manner like that of an ordinarily prudent man in full possession of his faculties, using reasonable care and operating a similar vehicle under like condition.

VIII

A person, arrested because it appears that he is intoxicated, has the right to refuse to subject himself to any of the usual tests and to a blood test.

IX

If any physical or other coercion frowned upon by due process is implied in taking a blood test without the consent and against the protests of a person arrested because it appears that he is intoxicated, the results of such blood test must be disregarded entirely.

[fol. 207] X

It is a denial of due process under the 14th Amendment of the Constitution of the United States and under the due process clause of the Constitution of the State of California, if brutal or shocking force is exerted in obtaining a blood test without the consent and against the protests of the person arrested because it appears that he is intoxicated, and the results of such blood test must be disregarded entirely.

XI

It is a denial of due process under the 14th Amendment of the Constitution of the United States if a blood test is exacted of a person arrested because it appears that he is intoxicated, by force and without the consent and against his protests, and the results of such blood test must be disregarded entirely.

you. I feel, for that reason, that you should be made to understand the law means what it says and that everybody, including you, is under an obligation to abide by it.

Now, if you want to say something, Mr. DiMaria, you may.

Mr. DiMaria: Yes, sir. The matter of the record was brought up once before, if Your Honor remembers, in [fol. 210-231] Mountain View; and the record appears much blacker than it actually is. It was explained away by Mr. Walton before. Apparently Your Honor doesn't understand it, but if Mr. Walton were given an opportunity to explain the record, I think it wouldn't appear as badly as it actually is.

The Court: The Court doesn't wish to go into the occasion. For the prior investigation of this offense, as you indicate, counsel, was to determine whether or not on a speeding charge there have been a sufficient number of violations within the year to permit heavier penalty than it would otherwise have been. But the record is over a long period of time. There have been quite a few violations and he has been operating around here for many years without having a resident license; and that has been partly the reason for the inability of the authorities to keep the same track of him as they would have anybody else.

The sentence of the Court will be a fine of $500 and 90 days in the County Jail. The 90 days will be suspended; he will be placed on probation for three years, conditioned on serving the first ten days, and his license will be suspended for 90 days.

Let me have your license. He got the license right away. Probation will be conditioned on serving five days.

All right, you may take a chair.

[fol. 232] IN THE MUNICIPAL COURT FOR THE PALO ALTO-MOUNTAIN VIEW JUDICIAL DISTRICT, COUNTY OF SANTA CLARA

STATEMENT ON APPEAL—Filed April 16, 1954

To the Honorable Alfred W. Bowen, Judge of the Above Entitled Court, and to the District Attorney of the County of Santa Clara, State of California:

WHEREAS, the defendant having on the 12th day of April, 1954 duly taken an appeal from the judgment therein entered in said Court on the 12th day of April, 1954.

You and each of you are hereby notified that said defendant, Marvin Stuart Walton, in the above-entitled cause now presents this his statement of grounds of appeal and points upon which he relies upon appeal from the above-entitled court to the Appellate Department of the Superior Court as follows:

1. The Court erred by refusing proposed Instructions No. 8, 9, 10 and 11 submitted by defendant.

2. The Court erred in denying defendant's objection to testimony of witness Bradford as to the analysis of the sample of blood of defendant as heresay and erred in denying defendant's motion to strike all testimony of witness Bradford as to the analysis of the sample of blood of defendant as heresay, as will appear from the transcript of the evidence at the trial which will be filed with this appeal.

3. The Court erred in denying defendant's offer of proof of evidence introduced at defendant's previous trial before said Court on the same charge after the prosecution had been permitted to introduce such evidence.

4. The Court erred in denying defendant's objection to the highly prejudicial question of the prosecution of "how often does defendant get drunk at your place?"

5. The Court erred in denying defendant's objection to the highly prejudicial question of the prosecution of "do you generally make a fool of yourself?"

[fols. 233-241] 6. The Court erred in denying defendant's objection to the highly prejudicial question of the prosecution of "how fast have you ever driven the car?"

The defendant now asks that the Court make an order for the transcripts of all of the court reporter's notes, of

all of the proceedings at the arraignment, setting for trial, the trial and all evidence and exhibits introduced at the trial, the findings of fact, the judgment and pronouncement of the same, the pronouncement of the sentence and any transcription of the pronouncement of the sentence, and the sentence itself, and the defendant further asks that the clerk deliver to him within the time required by law a copy of the reporter's transcript of all of the above, and also a copy of the transcript on appeal in said action.

Dated April 16th, 1954.

DiMaria, DiMaria & Daschbach, By Philip A. DiMaria, Attorneys for Defendant.

Let the transcript be prepared. Dated: April 20, 1954.

Alfred W. Bowen, Judge of the Municipal Court.

Affidavit of service attached.

[File endorsement omitted.]

[fols. 242-244] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CLARA, APPELLATE DIVISION.

Minutes of the Appellate Department of the Superior Court.

JUDGMENT—July 1, 1954

No. 11, The People vs. Marvin Stuart Walton.

Cause regularly before the Court for hearing on appeal from the Municipal Court with J. W. Feeley, Esq., appearing on behalf of the People and P. A. DiMaria, Esq., appearing as counsel for Defendant and Appellant;

Thereupon counsel submit the matter on briefs heretofore presented;

Whereupon the Court makes its Order the Judgment of the Lower Court is affirmed, all Judges concurring.

(Judge Wm. F. James, Presiding; Leonard R. Avilla & W. W. Jacka.)

[fols. 245-248] In the Superior Court of the State of California, in and for the County of Santa Clara, Appellate Department.

[Title omitted]

Order Denying Petition for Rehearing—July 16, 1954

Order petition for rehearing denied.

Wm. F. James, Presiding Judge.

I concur, Leonard R. Avilla, Dated: July 16, 1954.

[File endorsement omitted.]

[fol. 249] Supreme Court of the United States, October Term, 1954

No. 402

Marvin Stuart Walton, Petitioner,

v.

People of the State of California

Order Allowing Certiorari—Filed December 6, 1954

The petition herein for a writ of certiorari to the Superior Court of the State of California, Appellate Department, in and for the County of Santa Clara, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
OCT 14 1954
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM 1954

No. [redacted] 16

MARVIN STUART WALTON,
Petitioner

v.

PEOPLE OF STATE OF CALIFORNIA,
Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Santa Clara

JAY DARWIN
68 Post Street
San Francisco 4, California
Attorney for Petitioner

ROBERT F. PECKHAM
68 Post Street
San Francisco 4, California
Of Counsel

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

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In the Supreme Court of the United States

OCTOBER TERM 1954

No. .....

MARVIN STUART WALTON,
Petitioner

v.

PEOPLE OF STATE OF CALIFORNIA,
Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Santa Clara

Petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Department of the Superior Court of the State of California, entered in the above entitled case on July 16, 1954.

OPINIONS BELOW

No opinions were rendered either by the Municipal Court, Palo Alto—Mt. View Judicial District, or the Appellate Department of Superior Court of the State of California in and for the County of Santa Clara.

JURISDICTION

The judgment of the Appellate Department of Superior Court was pronounced on July 1, 1954, and a petition for rehearing was denied on July 16, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

Article VI, Sec. 5 of the Constitution of the State of California provides: "The Superior Courts shall have appellate jurisdiction in such cases arising in municipal and justices and other inferior courts in their respective counties or cities and counties as may be prescribed by law. The Legislature may, in addition to any other appellate jurisdiction of the Superior Courts, also provide for the establishment of appellate departments of the superior court in any county or city and county wherein any municipal court is established, and for the constitution, regulation, jurisdiction, government and procedure of such appellate departments."

The Legislature provided for such appeals in criminal cases by the enactment of Sections 1466-1469 inclusive of the Penal Code of the State of California. Section 1468 thereof provides that the procedure of such appeals shall be prescribed in rules promulgated by the Judicial Council. The Judicial Council promulgated the Rules on Appeal from the Municipal Courts and Inferior Courts in Criminal Cases effective July 1, 1936 (Rules 1-11).

From the final judgment of the Superior Court after the taking of such an appeal, from the Municipal Court, petitioner has no further appellate remedy under the laws of the State of California. Rules 7 and 10 of the Revised Appellate Department Rules promulgated by Judicial Council effective September 15, 1945 provide that entry of final judgment occurs upon the denial of the petition for rehearing. The petition for rehearing was denied on July 16, 1954.

QUESTIONS PRESENTED

Whether the means employed by state police to cause the involuntary extraction of blood from petitioner to determine sobriety and the use of the results of such a blood test as evidence of intoxication in a state prosecution for driving a motor vehicle while under the influence of alcohol violates the Due Process Clause of the Fourteenth Amendment under the circumstances of the instant case.

(i) Where the petitioner protests and refuses his consent to taking such blood test,

(ii) where the blood sample is extracted by police personnel from the petitioner by means of coercion and force,

(iii) where the police officers deny petitioner his request to consult his attorney or doctor during the time that the officers are compelling petitioner to submit to the blood test, and

(iv) where the results of a blood test taken in such a manner are admitted in evidence against petitioner through an expert witness who testifies that he does not know who made the analysis indicating the alcoholic content of petitioner's blood.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

I. Procedural History of the Case

The petitioner was charged with violation of Section 502 of the Vehicle Code of the State of California, which provides that driving under the influence of intoxicating liquor is a criminal offense. A trial was had on November 18, 1953 without a jury despite the demand for jury by the peti-

tioner. On appeal before the Appellate Department of the Superior Court, the lower Court was ordered to grant petitioner his right to a trial by jury. On April 7, 1954, petitioner was tried and convicted before a jury on the same charge.

The sentence of the lower Court after trial without a jury and after the lower Court found petitioner guilty of violation of said Sect. 502 was as follows: $150.00 fine and 30 days in the county jail suspended with one year probation with no suspension of the driver's license. As a result of petitioner insisting upon his constitutional right to a jury trial under the state constitution, the sentence by the same judge for the same offense after verdict of guilty was as follows: $500.00 fine and 90 days in county jail, 5 days to be served with 85 days suspended, three years probation, and driver's license to be suspended for 90 days.

The Appellate Department of the Superior Court affirmed the judgment of conviction on July 1, 1954 and denied a petition for rehearing on July 16, 1954. Petitioner has no further remedy for appellate review in the state courts of California.

II. The Facts Material to the Questions Presented

The petitioner, after being stopped by the California Highway Patrol while driving his automobile on the public highway, south of Palo Alto, California, was taken to the Accident Investigation Bureau in San Jose (R. 53), where he was requested to submit to various tests for sobriety (R. 56). The officer, the technician, and the petitioner all testified that the petitioner refused to submit to these particular tests (Officer Shannon, R. 56; Technician, R. 69; petitioner, R. 111).

The petitioner was then asked to submit to a blood test wherein a sample of his blood was to be extracted from his

III. Federal Question Raised Below in Trial Court and Before Appellate Department of Superior Court

(A) In Trial Court:

When the petitioner made an objection to the introduction into evidence of the blood sample, the Court interrupted counsel before he could state his ground and overruled his objection (R. 67, 68).

Likewise, petitioner's motion to strike all evidence relating to the blood test was summarily denied with the admonition to petitioner's Counsel that "You have a half a minute, Mr. Di Maria; if you can't finish within that half minute, I am not going to compel the jury to wait any longer, we will adjourn for lunch" (R. 45).

Not being able to exclude the evidence by objection, trial counsel submitted instructions embodying the federal questions raised herein.

Petitioner submitted his proposed instructions VIII (R. 198), IX (R. 198), X (R. 199), and XI (R. 199), which embrace the federal question presented herein. These four proposed instructions were refused (R. 194).

Proposed instruction VIII provided as follows: "A person arrested because it appears that he is intoxicated, has the right to refuse to subject himself to any of the usual tests and to a blood test."

Proposed instruction IX provides as follows: "If any physical or other coercion frowned upon by due process is implied in taking a blood test without the consent and against the protests of a person arrested because it appears that he is intoxicated, the results of such blood test must be disregarded entirely."

Proposed instruction X provides as follows: "It is a denial of due process under the 14th Amendment of the Constitution of the United States and under the due process clause of the Constitution of the State of California, if

brutal or shocking force is exerted in obtaining a blood test without the consent and against the protests of the person arrested because it appears that he is intoxicated, and the results of such blood test must be disregarded entirely."

Proposed instruction XI provides as follows: "It is a denial of due process under the 14th Amendment of the Constitution of the United States if a blood test is exacted of a person arrested because it appears that he is intoxicated, by force and without the consent and against his protests, and the results of such blood test must be disregarded entirely."

No modified instructions embracing these issues were given to the jury (R. 180-188).

(B) Before the Appellate Department of the Superior Court:

Under the rules governing appeals in criminal cases from Municipal Courts to the Appellate Department of the Superior Court, the party prosecuting the appeal must file a "Statement of Appeal."

In the Statement of Appeal filed below in this case, petitioner specified as his first ground of appeal that the Municipal Court erred in refusing the proposed instructions VIII, IX, X, XI, set forth above. The Statement of Appeal herein is a part of the certified record of the Court below that is filed herewith.

The second ground specified as error the overruling of the objection made below by petitioner to the testimony of the Criminologist Bradford relating to the alcoholic content of the blood and to the denial of the motion to strike all evidence relating to the blood test.

These grounds specifying error were before the Appellate Department of the Superior Court which affirmed the Judgment of conviction and denied the petition for rehearing without filing any written opinion.

ARGUMENT

I. Certorari Should Be Granted In the Instant Case Because an Important Question Affecting Law Enforcement and the Rights of Accused Under the 14th Amendment Is Involved: The Doctrine of the Rochin Case Needs Amplification In Its Application to the Use of Involuntary Blood Tests

The blood test has become an important technique of law enforcement to the state police of the nation.[1] In 1953, seventy-nine thousand persons were arrested for drunk driving in the United States.[2] The blood test is frequently used in numerous jurisdictions by state police in the prosecution of drunk drivers.

The doctrine of the *Rochin* case has not been applied by this Court to the use of involuntary blood tests in state prosecutions. The state police, as well as the accused, are without the benefit of the guidance of this Court in the use of blood tests. How far the state police may go in extracting a sample of blood without violating the *Rochin* case doctrine is still an open question.

The Stanford Law Review, in commenting upon the *Rochin* case, focused atention on the issue: "What will the *Rochin* case mean as a guide to state law enforcement officers and courts? The language of the opinion will justify a simple answer as to stomach pumps: they fall below the minimum standards of due process. But what about other methods of modern criminology, such as involuntary blood tests? Will the use of evidence obtained by such tests be a violation of due process?"[3]

---

1. Ladd & Gibson Legal-Medical Aspects of Blood Tests to Determine Intoxication, 29 Va. L. Rev. 749 (1943).

2. Uniform Crime Reports for the United States issued by the Federal Bureau of Investigation, Annual Bulletin for 1953.

3. 4 Stanf. L. Rev. 591 at 593 (1952).

II. Coercion Was Used to Compel the Petitioner to Surrender a Blood Sample In Violation of the Due Process Clause of the 14th Amendment

The coercive means employed by the state police to cause the involuntary extraction of blood from petitioner to determine sobriety violates the Due Process Clause and caused the evidence of the blood sample to be inadmissible.

Rochin v. California, 342 US 165, 72 S.Ct. 205 (1951).

All witnesses including the police and the petitioner agree that the petitioner refused to submit to the blood test upon being taken to the police station (R. 56, 57, 72, 110). Petitioner asked to consult an attorney or a doctor before submitting to the blood test but was refused (R. 59). While the petitioner continued to protest and refused to submit, one of the police officers rolled up his sleeve and held his arm while the police technician injected the needle and extracted the blood (R. 141, 142). The police officers told the petitioner he had no other choice except to submit to the blood test (R. 141).

Coercion was applied when petitioner was told he had to submit to the test "or else". The refusal to allow him to seek independent advice either legal or medical served the further purpose to indicate to the petitioner at the time he could not refuse to submit to the test and must remain at the police station until he was compelled to give his blood. Notwithstanding this coercion, the petitioner continued to protest as the officer applied the force needed to prepare his arm for the injection and the other officer applied the needle.

While the petitioner did not resort to violent physical resistance, and thus did not provoke further more violent restraint being imposed by the officers upon him, the force and coercion that were in fact used were no less repugnant

to the fundamental constitutional guarantees of the petitioner. The coercion found in this case shocks the conscience and offends our sense of fairness though accompanied by force more slight and subtle than found in the *Rochin* case. The enforcement of the constitutional rights of a defendant cannot be reserved for the bully defendant whose violent propensities cause more overt physical resistance to the compulsion of the officers.

The petitioner's own language best explains his state of mind when the officers seized his arm and commenced to take the blood sample: "The only way I could object to it physically was to shove them away, and that would have aggravated the situation" (R. 141).

The peaceful defendant such as the petitioner should not be penalized for his failure to strike and kick the officers, where he persistently protests and refuses to submit to the blood test and the officers seize his arm and inject the needle against his will. Otherwise, a premium would be placed upon violent resistance, and only the ruffian's constitutional rights would be safeguarded by the Courts. The coercive conduct of the police in obtaining the evidence does not become less offensive because the defendant's refusal to submit is less violent. Such police conduct as found in the instant case comes within the doctrine of the *Rochin* case as violative of the petitioner's constitutional rights.

The lower court should have excluded such evidence not only because of the offensive police conduct but because the evidence was unreliable in that the person who made the analysis did not testify and the criminologist Bradford could not identify who made the analysis of the purported blood sample.

III. The Petitioner's Privilege Against Self Incrimination Was Violated When His Blood Was Extracted Against His Will and Over His Protest

Blood taken from the veins of the petitioner was inadmissible when taken from him without his consent. The physical coercion and forcible extraction of evidence from the veins of the petitioner by the use of a needle without the consent of the petitioner compelled him to be a witness against himself in violation of the Fifth and Fourteenth Amendments of the United States Constitution and the admission of such evidence was a violation of the petitioner's constitutional rights.

Rochin v. California, supra (Concurring opinions of Justices Black and Douglas);

Snyder v. Massachusetts, 291 U.S. 97, 78 L.Ed. 674, 54 S.Ct. 330;

Boyd v. United States, 116 U.S. 616, 29 L.Ed. 746, 6 S.Ct. 524.

Therefore petitioner respectfully requests that a writ of certiorari issue to the Appellate Department of the Superior Court of the State of California in and for the County of Santa Clara.

JAY DARWIN
68 Post Street
San Francisco 4, California
Attorney for Petitioner

ROBERT F. PECKHAM
68 Post Street
San Francisco 4, California
Of Counsel

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CLARA, APPELLATE DEPARTMENT

No. 11

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

MARVIN STUART WALTON, DEFENDANT

ORDER PETITION FOR REHEARING DENIED

Wm. F. James, Presiding Judge.

I concur.

LEONARD R. AVILLA.

Dated: July 16, 1954.

The foregoing instrument is a correct copy of the Original on file in this office: Attest: July 19, 1954—G. E. Tarleton, County Clerk.

Filed July 20, 1954

KATHRYN EDMONDSON, Clerk of Municipal Court
By B. A. SHORT, Deputy.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CLARA, APPELLATE DEPARTMENT

No. 11

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

MARVIN STUART WALTON, DEFENDANT

ORDER JUDGMENT OF THE LOWER COURT AFFIRMED

Wm. F. James, Presiding Judge.

I concur,

LEONARD R. AVILLA,

JUDGE W. W. JACKA, not participating.

The foregoing instrument is a correct copy of the original on file in this office. Attest: July 19, 1954—G. E. Tarleton, County Clerk, By P. H. Steiling, Deputy.

Filed July 20, 1954

KATHRYN EDMONDSON, Clerk Municipal Court
By B. A. SHORT, Deputy.

(7980)

Office - Supreme Court, U. S.
FILED
NOV 16 1954
HAROLD B. WILLEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 402 16

MARVIN STUART WALTON,
Petitioner,
vs.
PEOPLE OF STATE OF CALIFORNIA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

EDMUND G. BROWN,
Attorney General of the State of California,
CLARENCE A. LINN,
Assistant Attorney General of the State of California,
ARLO E. SMITH,
Deputy Attorney General of the State of California,
600 State Building, San Francisco 2, California,
Attorneys for Respondent.

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Department of the Superior Court in and for the County of Santa Clara. The argument will discuss the sufficiency of the objection both in the trial court and the Appellate Department of the Superior Court to the introduction of blood test evidence.

QUESTIONS PRESENTED.

The question here presented involves a conflict of evidence and even if the evidence concerning the alleged involuntary taking of a blood sample, is taken most favorably to the defendant, no federal question is presented.

A further question here presented is whether this objection has been raised in the California courts.

STATEMENT OF THE CASE.

Petitioner was arrested for speeding, driving without a license, and drunk driving, all misdemeanors, on May 8, 1953 (RT 2:25; 4:16). He was arrested in Santa Clara County by State Highway Patrolmen. The complaint charged only drunk driving (misdemeanor) (RT 3). Petitioner entered a plea of not guilty and was tried by a jury in the Municipal Court (RT 1).

The jury returned a verdict of guilty (RT 189). Petitioner prosecuted an appeal in the Appellate Department of the Superior Court in and for Santa

Clara County. The judgment below was affirmed without opinion.

STATEMENT OF THE FACTS.

While on a routine patrol, Officers Shannon and Daly of the California Highway Patrol observed petitioner speed out from the parking area of a restaurant, cross the southbound traffic lane, and cut in front of another vehicle traveling north. The time was approximately 10:00 o'clock p.m. on a Friday evening and the traffic was heavy. Appellant's vehicle then accelerated and ricocheted from a traffic island. Petitioner's speed was clocked at 60 to 65 miles per hour in a 35 mile an hour speed zone (RT 8, 9).

After being stopped, petitioner refused to give his name, was staggering in his walk, was repetitious in his conversation, and failed to exhibit a California driver's license (RT 16).

Petitioner was then taken to the Accident Investigation Bureau in San Jose. While en route, he stated he had been drinking (RT 16, 18). Officer Shannon testified that petitioner was under the influence of intoxicating liquor (RT 21).

While at the Accident Bureau, petitioner refused to perform the balance and coordination test which is normally given as a test for sobriety (RT 20). He was also requested to give a sample of blood. He refused to do so at first, but later consented. Peti-

tioner finally rolled up his sleeve, stuck his arm out and said "Well, take it." (RT 57).

The technician who withdrew the blood sample testified that petitioner consented to taking of the blood (RT 39). This technician also testified that in his opinion the petitioner was under the influence of liquor at the time. He noted there was an odor of alcohol on his breath, that his face was flushed, that his clothes were slightly mussed, that his eyes were bloodshot, pupils dilated, and his attitude very antagonistic (RT 68).

The chemist who analyzed this sample testified that it contained 24 one-hundredths of one per cent of alcohol, and that this amount of alcohol would result in intoxication (RT 29).

Petitioner's testimony concerning the blood test in question is as follows:

> "They rolled up my left arm, sleeve of my left arm, and injected the needle and removed the sample, although I continued to object." (RT 110).

ARGUMENT.

I. THE OBJECTION TO THE ALLEGED INVOLUNTARY BLOOD SAMPLE IS RAISED FOR THE FIRST TIME IN THE PETITION FOR CERTIORARI.

Before a question may be raised in this court, it must have been properly raised in the court below. During the trial petitioner did not object to the introduction of the blood sample evidence upon the ground that it was taken by coercion. Although petitioner

could have raised a due process objection on appeal even though no timely objection was made in the trial court, he did not raised this question on appeal. (See *People v. Millum,* 42 Advance California 536, 539 (a confession case).)

Petitioner contends that he objected to the introduction of the blood sample evidence upon the ground that the sample was obtained by force. He refers to pages 67, 68 and 45 of the Reporter's Transcript to establish this claim. A reading of these pages will convince you that the sole basis of petitioner's objection to the introduction of this evidence was that the testimony of the results of the chemist's analysis was hearsay.

This conclusion is supported by the fact that this question was not raised on appeal. In order to establish this fact petitioner has filed herewith a certified copy of petitioner's briefs in the appellate department of the Superior Court. In these briefs appellant contends that the testimony concerning the blood sample analysis was hearsay; that the court erred in refusing to give his instructions concerning the blood tests and that the prosecutor exceeded the proper scope of cross-examination. It thus appears that no federal question was raised in the trial court or on appeal.

The question of the involuntary nature of the taking of the blood sample is raised for the first time in the present petition.

II. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

A. The propriety of the proposed jury instructions is purely a question of State law.

Whether or not the proposed jury instructions concerning blood samples obtained by force correctly state the law in the abstract is of no consequence. Whether such instructions should be given to a jury is purely a question of State procedure. The allocation of questions of fact between judge and jury is not prohibited by the 14th amendment. *Stein v. New York,* 346 U. S. 156 at 179 (confession case); *Snyder v. Massachusetts,* 291 U. S. 97, at 105 (abolition of a jury not a violation of due process—dictum). Alleged involuntary confessions are treated variously. Some states treat the question as one for the judge, others as a question for the jury, and a third group permits the question to be passed on by both judge and jury.

B. The question presented is at most one of credibility.

The petitioner has overlooked the rule that only evidence which is uncontradicted by the State in its version of the attendant circumstances is considered on appeal in determining whether there has been a denial of due process. *Stein v. New York,* 346 U. S. 156, 181, 183-184; *Gallegos v. Nebraska,* 342 U. S. 55, 61-63; *Harris v. South Carolina,* 338 U. S. 68, 69; *Turner v. Pennsylvania,* 338 U. S. 62, 63.

There is a conflict between the witnesses for the prosecution and the testimony of the petitioner. This conflict, however, has been resolved by the trier of fact in favor of the prosecution.

The testimony of Officer Shannon was that petitioner was asked to submit to a blood test. He raised his sleeve then changed his mind on the subject. This occurred a couple of times. He finally raised his arm and said, "take it." (RT 58-59). Petitioner was not forced to submit to the blood test (RT 58).

The technician who withdrew the blood sample, testified that petitioner consented to the taking of the blood sample (RT 69).

The alleged forced withdrawal of a blood sample is, thus, without substance when any conflict between opposing witnesses is resolved in favor of the prosecution.

C. Even assuming the facts most favorably to the petitioner, no federal question is presented.

The case of *Rochin v. California,* 342 U. S. 165 is relied upon by petitioner. The taking of evidence from the person of defendant or by entry into his body was not the decisive factor in that case. The entire course of conduct was examined and found to be brutal and shocking.

In the *Rochin* case the police forced entry into a bedroom without a search warrant. When he placed some capsules in his mouth the police grabbed him by the throat and sought to force him to eject them. Thereafter they took him to a hospital where he was strapped to a table. A tube was put down his throat and the capsules expelled. It was stipulated that the capsules were taken from defendant by use of a stomach pump without his consent and against his will.

As we have noted above the testimony for the prosecution establishes that petitioner consented to the withdrawal and no force was used to secure this consent. However, even if it is assumed for the purposes of discussion that petitioner's testimony is correct, his testimony does not bring this case within the *Rochin* doctrine.

Petitioner testified that he objected to the taking of the blood samples and that "they rolled up my left arm, the sleeve of my left arm and injected the needle and removed the sample, although I continued to object." (RT 110).

This testimony falls far short of the test of shocking brutality as exemplified by the facts of the *Rochin* case as set out above.

CONCLUSION.

We respectfully submit that no substantial federal question is presented by the petition filed herein for a writ of certiorari and the same should be denied.

Dated, San Francisco, California,
November 12, 1954.

EDMUND G. BROWN,
Attorney General of the State of California,
CLARENCE A. LINN,
Assistant Attorney General of the State of California,
ARLO E. SMITH,
Deputy Attorney General of the State of California,
Attorneys for Respondent.

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JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

Petition for certiorari was filed in this Court on October 14, 1954 and certiorari was granted on December 6, 1954.

The judgment of the Appellate Department of Superior Court was pronounced on July 1, 1954, and a petition for rehearing was denied on July 16, 1954.

The Constitutional issue now being presented was raised in the trial Court and the Appellate Department of Superior Court.

QUESTIONS PRESENTED.

Whether the means employed by state police to cause the involuntary extraction of blood from petitioner to determine sobriety and the use of the results of such a blood test as evidence of intoxication in a state prosecution for driving a motor vehicle while under the influence of alcohol violates the Due Process Clause of the Fourteenth Amendment under the circumstances of the instant case.

(i) Where the petitioner protests and refuses his consent to taking such blood test,

(ii) where the blood sample is extracted by police personnel from the petitioner by means of coercion and force,

(iii) where the police officers deny petitioner his request to consult his attorney or doctor during the

time that the officers are compelling petitioner to submit to the blood test,

(iv) where the results of a blood test taken in such a manner are admitted in evidence against petitioner through an expert witness who testifies that he does not know who made the analysis indicating the alcoholic content of petitioner's blood, and

(v) where trial Court fails to give any instructions on the issue of voluntariness of the blood test.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE.

I. Procedural History of the Case.

The petitioner was charged with violation of Section 502 of the Vehicle Code of the State of California, which provides that driving under the influence of intoxicating liquor is a criminal offense. A trial was had on November 18, 1953 without a jury despite the demand for jury by the petitioner. On appeal before the Appellate Department of the Superior Court, the lower Court was ordered to grant petitioner his right to a trial by jury. On April 7, 1954, petitioner was tried and convicted before a jury on the same charge.

The sentence of the lower Court after trial without a jury and after the lower Court found petitioner guilty of violation of said Section 502 was as follows: $150.00 fine and 30 days in the county jail suspended with one year probation with no suspension of the driver's license. As a result of petitioner insisting upon his constitutional right to a jury trial under the state constitution, the sentence by the same judge for the same offense after verdict of guilty was as follows: $500.00 fine and 90 days in county jail, 5 days to be served with 85 days suspended, three years probation, and driver's license to be suspended for 90 days.

The Appellate Department of the Superior Court affirmed the judgment of conviction on July 1, 1954 and denied a petition for rehearing on July 16, 1954. Petitioner has no further remedy for appellate review in the state courts of California.

II. The Facts Material to the Questions Presented.

The petitioner, after being stopped by the California Highway Patrol while driving his automobile on the public highway, south of Palo Alto, California, was taken to the Accident Investigation Bureau in San Jose (R. 40), where he was requested to submit to various tests for sobriety. (R. 42.) The officer, the technician, and the petitioner all testified that the petitioner refused to submit to these particular tests. (Officer Shannon, R. 42; Technician, R. 51, 52; petitioner, R. 81, 82.)

The petitioner was then asked to submit to a blood test wherein a sample of his blood was to be extracted

from his arm. (R. 17, 18.) The petitioner continuously protested and refused to submit to the taking of his blood. (R. 82.) Petitioner testified that his blood sample was extracted against his will (R. 82) and as a result of implied threats and compulsion exercised in the form of persistent demands on the part of the police officers that petitioner had to submit to the test and that he had no other choice. (R. 104, 105.) One of the police officers rolled up his left sleeve and held his arm while the technician injected the needle. (R. 105.) Petitioner testified that he continued to protest but did not resort to physical resistance because he did not wish to aggravate the situation. (R. 105.)

The police officer Shannon testified that the petitioner objected repeatedly to undergoing a blood test and that he was uncooperative and somewhat belligerent. (R. 42.) Officer Shannon testified further that petitioner asked to call and consult "someone—I cannot remember whether it was his doctor when it came to taking the blood sample, or whether it was his attorney * * *" (R. 43, 44), and that petitioner's request to consult his doctor or his attorney was denied by the officers conducting the investigation. (R. 44.)

The police technician Hamre testified that the petitioner was belligerent and uncooperative in his attitude just prior to the extraction of the blood sample and that petitioner had refused to submit to the test twice before the blood was actually taken. (R. 53, 54.) After petitioner was refused legal or medical advice,

the officers testified he did not object further to the blood test and consented. (R. 42, 52.) The technician is not definite in his recollection whether a police officer held petitioner's arm. (R. 54.) No analysis of petitioner's blood was made by police technician Hamre. (R. 55.) Whoever made the analysis was not established by the respondent. (R. 34, 35.) The criminologist Bradford testified his records did not show who made the analysis. (R. 24, 34.) Nevertheless, the respondent's Bradford was allowed to testify as to the alcoholic content of the purported sample of petitioner's blood. (R. 24.)

SUMMARY OF ARGUMENT.

Coercion used to extract a blood sample from the petitioner violates the Due Process Clause, as did the use of the blood sample as evidence to convict him.

(A) Coercion is equally offensive whether employed to extract real or verbal evidence over the protest and against the will of the accused. The extraction of either real or verbal evidence by force equally offends the community's sense of fair play and decency. Not only confessions obtained by torture and brutality but also confessions obtained by other sufficiently coercive methods have been condemned as violative of Due Process. So with real evidence, its extraction can be repugnant to Due Process even though the coercion does not consist of gross physical violence and brutality.

(B) Coercion was used by State Police to extract from the petitioner a blood sample. The petitioner repeatedly refused to submit to the blood test; requested an attorney or doctor and was refused by the police; had his arm held by the officer while a technician injected the needle and withdrew the blood. Petitioner continued to protest but did not resort to physical resistance.

(C) *Rochin v. California* applies to the facts of this case: The forcible extraction of blood from petitioner violates due process and the blood sample was inadmissible.

The dignity, integrity, and privacy of the individual are equally violated by the forcible entry into his body of the stomach pump or of the needle for blood. The forcible entry in either manner constitutes an assault. The use of force in this case is sufficiently shocking and offensive though less violent and brutal than *Rochin*.

Rochin should not be limited to cases of gross violence and brutality; otherwise, a premium would be placed upon violence and only the constitutional rights of the bully accused would be protected. The accused who protests forcible entry into his body, but does not resort to physical resistance should not be precluded from the protection of due process.

The forcible intrusion by the police into the body of the individual to extract real evidence against his will under coercive circumstances is the conduct that violates due process. Stomach pumping (gastric

lavage) as a medical procedure is frequently used by civilized medical men and is not itself a brutal, shocking, unfair or indecent technique of a medieval barbaric nature. It is its forcible use by the police against the will of the accused that is offensive. Likewise, the forcible use of the needle by the police to puncture the skin, tissue, and veins of petitioner against his will is what shocks and offends our community's sense of fair play and decency.

(C) The evidence of the blood test was unreliable and should have been excluded. The prosecution never established who made the analysis of the blood sample extracted in this manner. Such evidence should have been excluded when its unreliability was considered together with its improper extraction.

(D) The petitioner's privilege against self-incrimination was violated when his blood was extracted against his will. The use of force to extract evidence from the veins of petitioner without his consent compelled him to be a witness against himself in violation of the Fifth and Fourteenth Amendments.

(E) The forcible intrusion upon the person of the individual by state police in this case requires the exclusion of the evidence extracted from the body and a reversal of the conviction. The great concern of this Court for the security of the individual in his person and property has been expressed in *Wolf, Rochin,* and most recently in *Irvine v. California.* The sanctity of the person has been protected to a greater degree than the security of the individual's

property. The use of coercion to invade the person for the extraction of real evidence under offensive circumstances will result in the exclusion of the evidence and the reversal of the conviction. Intrusion upon the privacy of the individual as to his property has been condemned but the fruits of the search have not been rendered inadmissible and the conviction reversed. In this case, the person of petitioner was affronted by the forcible intrusion of the police. The evidence should be excluded and the conviction reversed.

(F) Failure of the trial Court to give petitioner's requested instructions relating to the voluntariness of the blood test and the application of Rochin was a violation of due process. While the record in its entirety clearly establishes petitioner's blood was extracted by the use of coercion, respondent contends the officer's testimony reveals the consent of petitioner. The trial Court did not present to the jury any instructions relating to voluntariness of the blood test in accordance with California procedure. Such failure to give such an instruction deprives petitioner of an adjudication on the issue of voluntariness and is a violation of due process of law in accordance with the rule of this Court.

ARGUMENT.

THE COERCION USED TO EXTRACT A BLOOD SAMPLE FROM THE PETITIONER VIOLATES THE DUE PROCESS CLAUSE AS DID THE USE OF THE BLOOD SAMPLE AS EVIDENCE TO CONVICT HIM.

The coercive means employed by the state police to cause the involuntary extraction of blood from petitioner to determine sobriety violates the Due Process Clause and caused the evidence of the blood sample to be inadmissible.

Rochin v. California, 342 U.S. 165 (1951).

(A) Coercion Is Equally Offensive Whether Employed to Extract Real or Verbal Evidence Over the Protest and Against the Will of the Accused.

The equally offensive nature of coerced real or verbal evidence was recognized by this Court in the *Rochin* case:

> "To attempt in this case to distinguish what lawyers call 'real evidence' from verbal evidence is to ignore the reasons for excluding coerced confessions. Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. * * *"
>
> Mr. Justice Frankfurter for the Court in *Rochin v. California.*

Due process of law does not mean that evidence extracted by force from the body can convict a man, but evidence extracted by force from his mind cannot.

Confessions obtained by torture and brutality have been found repugnant to Due Process.

Brown v. Mississippi, 297 U.S. 278 (1936).

The use of coercion to obtain confessions without physical torture and brutality has been held by this Court a violation of Due Process where the other coercive methods employed were inconsistent with our basic concepts of fairness and decency.

Watts v. Indiana, 338 U.S. 49;
Turner v. Pennsylvania, 338 U.S. 62;
Harris v. South Carolina, 338 U.S. 68;
Leyra v. Denno, 347 U.S. 556.

Thus, gross physical violence and brutality should not be the only criteria for the condemnation of forcible extraction of real evidence from the body where other equally repugnant elements of coercion are present.

(B) Coercion Was Used by State Police to Extract From the Petitioner a Blood Sample.

All witnesses including the police and the petitioner agree that the petitioner refused to submit to the blood test upon being taken to the police station. (R. 42, 54, 82.) Petitioner asked to consult an attorney or a doctor before submitting to the blood test but was refused. (R. 43, 44.) While the petitioner continued to protest and refused to submit, one of the police officers rolled up his sleeve and held his arm while the police technician injected the needle and extracted the blood. (R. 105.) The police officers told the petitioner he had no other choice except to submit to the blood test. (R. 104, 105.)

Coercion was applied when petitioner was told he had to submit to the test "or else". The refusal to allow him to seek independent advice either legal or medical served the further purpose to indicate to the petitioner at the time he could not refuse to submit to the test and must remain at the police station until he was compelled to give his blood. Notwithstanding this coercion, the petitioner continued to protest as the officer applied the force needed to prepare his arm for the injection and the other officer applied the needle. Force was used when the officer held petitioner's arm, needle was injected into his skin, tissue, and vein by the technician, and his blood withdrawn.

(C) Rochin v. California Applies to the Facts of This Case: The Forcible Extraction of Blood From Petitioner Violates Due Process and the Blood Sample Was Inadmissible.

The forcible extraction of blood from the veins of the petitioner against his will is as offensive to "the community's sense of fairness and decency" as was the extraction of narcotic capsules from the stomach of Rochin, "The right to privacy * * * [which is] implicit in the concept of ordered liberty" (*Wolf v. Colorado,* 338 U.S. 25) applies equally to a man's veins and to his stomach. The police technician's forcible puncture of petitioner's skin, tissue, and vein with a needle over his protest and against his will is as offensive and shocking to the dignity and the integrity of the individual as is the use of the stomach pump by the police doctor upon Rochin. Both procedures under these circumstances constitute an as-

sault upon the person with inner penetration of the body; both result in the physical debasement of the individual; and both deny the accused the dignity and the privacy of the individual required by our concept of the individual's relationship to the State.

In view of these considerations, we disagree with respondent's contention that the facts of petitioner's case are not sufficiently brutal and shocking to come within the *Rochin* doctrine.

The use of force to extract blood under the circumstances of this case satisfies the criteria of *Rochin*.

While the petitioner did not resort to violent physical resistance, and thus did not provoke further more violent restraint being imposed by the officers upon him, the force and coercion that were in fact used were no less repugnant to the fundamental constitutional guarantees of the petitioner. The coercion found in this case shocks the conscience and offends our sense of fairness though accompanied by force more slight and subtle than found in the *Rochin* case. The enforcement of the constitutional rights of a defendant cannot be reserved for the bully defendant whose violent propensities cause more overt physical resistance to the compulsion of the officers.

The petitioner's own language best explains his state of mind when the officers seized his arm and commenced to take the blood sample: "The only way I could object to it physically was to shove them away, and that would have aggravated the situation." (R. 105.)

The peaceful defendant such as the petitioner should not be penalized for his failure to strike and kick the officers, where he persistently protests and refuses to submit to the blood test and the officers seize his arm and inject the needle against his will. Otherwise, a premium would be placed upon violent resistance, and only the ruffian's constitutional rights would be safeguarded by the Courts. The coercive conduct of the police in obtaining the evidence does not become less offensive because the defendant's refusal to submit is less violent. Such police conduct as found in the instant case comes within the doctrine of the *Rochin* case as violative of the petitioner's constitutional rights.

Limitation of *Rochin* to cases of gross physical violence and brutality will have unfair and unjust consequences.

Suppose the police desire to extract from a suspect's body certain "real evidence" by way of a blood test, stomach pump, catheter, or some other procedure of modern medicine. The suspect refuses to submit to the procedure required to extract the desired evidence. He does not give his consent. Nonetheless, the officer, technician, or doctor commences the necessary acts to extract the evidence. The suspect continues to protest without result. Several alternative possibilities can result thereafter.

First, the suspect can physically resist the attempt to enter his body. The officer, technician, or doctor stops and abandons the effort to extract the evidence. The suspect has thus enforced his refusal to submit

by his own violence. In a sense, due process would be obtained by vigilante methods.

Secondly, when the suspect physically resists, the officers themselves resort to more violent force to restrain the suspect. The degree of brutality and violence would in no small part depend upon the strength of the respective participants and the persistence of the suspect. The evidence thus obtained through gross physical violence would undoubtedly be inadmissible under *Rochin*.

Thirdly, when the person conducting the procedure persists in proceeding, the suspect continues to protest but does not resort to physical resistance. The evidence is thus obtained by forceful entry into his body against his will.

Would it not indeed offend our concepts of fair play and decency if *Rochin* was so construed that the suspect in the third situation would be the only one against whom the evidence could be used to convict. Undue emphasis upon the presence of excessive force and physical brutality could lead to such an application of *Rochin*. No person whose body the police seek to enter by force against his will and over his protest should be compelled to resort to violent physical resistance of the police officers before he can be heard to invoke the protection of the Due Process Clause. To require forcible resistance as a necessary prerequisite for the Court's intervention would result in a perversion of the Due Process Clause. It would invite violence on the part of the accused before he could assert his constitutional rights and

possibly more violent restraint on the part of the police officers. Peaceful cooperation of the accused with law enforcement officers would be discouraged. Clearly, such a limitation of *Rochin* would not make for a more ordered administration of criminal law enforcement by the states.

The forcible intrusion by the police into the body of the individual to extract real evidence against his will under coercive circumstances is the conduct that violates Due Process. The medical procedure itself is not necessarily what is shocking, brutal, and offensive but rather its use by the police to reach into the suspect's body against his will that is repugnant to Due Process. *Rochin* stands for more than a condemnation of stomach pumps in state criminal law enforcement. We concede, of course, that stomach pumping is an unpleasant and uncomfortable procedure. We do not, however, concede that in *Rochin* a medieval, barbaric instrumentality was used to extract the evidence from Rochin's body and for that reason its use was shocking, brutal, and offensive to common decency and fairness. Gastric lavage (stomach pumping) is standard routine medical procedure used with great frequency in civilized countries. Treatment through the use of gastric or stomach lavage, for example, is recommended for patients suffering from acute alcoholism, methanol intoxication, intoxication by morphine and related alkaloids, and mercury poisoning.

Harrison Principles of Internal Medicine (1950), pp. 735, 737, 747 and 753.

Men of medicine in civilized countries employ the use of the stomach pump.

It is not the use of the stomach pump or gastric lavage itself under ordinary circumstances that is shocking, brutal, or offensive to our concepts of fairness and decency but rather its forcible use by the police to invade Rochin's body against his will and over his protest. Likewise, there is nothing shocking, brutal, unfair or indecent about the injection of a needle into the skin, tissue, and vein under ordinary circumstances. Its use only becomes offensive and shocking when the police forcibly employ this medical procedure to extract blood as evidence over the protests and against the will of petitioner.

(D) The Evidence of the Blood Test Was Unreliable and Should Have Been Excluded.

The lower court should have excluded such evidence not only because of the offensive police conduct but because the evidence was unreliable in that the person who made the analysis did not testify and the criminologist Bradford could not identify who made the analysis of the purported blood sample. (R. 24, 34, 35.)

(E) The Petitioner's Privilege Against Self-Incrimination Was Violated When His Blood Was Extracted Against His Will and Over His Protest.

Blood taken from the veins of the petitioner was inadmissible when taken from him without his consent. The physical coercion and forcible extraction of evidence from the veins of the petitioner by the

use of a needle without the consent of the petitioner compelled him to be a witness against himself in violation of the Fifth and Fourteenth Amendments of the United States Constitution and the admission of such evidence was a violation of the petitioner's constitutional rights.

Rochin v. California, supra (Concurring opinions of Justices Black and Douglas);

Snyder v. Massachusetts, 291 U.S. 97, 78 L.Ed. 674, 54 S.Ct. 330;

Boyd v. United States, 116 U.S. 616, 29 L.Ed. 746, 6 S.Ct. 524.

(F) The Forcible Intrusion Upon the Person of the Individual by State Police in This Case Requires the Exclusion of the Evidence Extracted From the Body and a Reversal of the Conviction.

A great concern for the security of the individual in his person and property underlies the Fourteenth Amendment.

In *Wolf v. Colorado, supra,* the late Mr. Justice Jackson commented thusly:

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through Due Process Clause."

Notwithstanding, the improper invasion of the individual's privacy as to his papers, records, and documents in his office did not compel the Court to reverse in *Wolf.*

In *Rochin v. California,* however, a unanimous Court elevated the security of the individual in his person against forcible police intrusion to a higher plane than that accorded to him in the security of his property. For the evidence extracted by forceful police methods from Rochin's body was excluded and the conviction reversed.

More recently, this greater concern for the protection of the individual's person was acknowledged in the opinion of the Court in *Irvine v. California,* 347 U.S. 128 when the Court compared the *Irvine* situation with *Rochin.*

> "An effort is made, however, to bring this case under the sway of Rochin * * * That case involved, among other things, an illegal search of the defendant's person. But it also presented an element totally lacking here—coercion applied by a physical assault upon his person to compel submission to the use of a stomach pump. This was the feature which led to a result in Rochin contrary to that in Wolf. Although Rochin raised the search and seizure question, the Court studiously avoided it and never once mentioned Wolf. Obviously, it thought that illegal search and seizure alone did not call for reversal. However obnoxious are the facts in the case before us, they do not involve coercion, violence or brutality to the person, but rather a trespass to property, plus eavesdropping."

Certainly then in the light of these cases and the Court's concern for the security of the individual's person, the coercive entry of the petitioner's body to extract evidence under the circumstances of this

case will not be upheld and the evidence will be ruled inadmissible and the conviction reversed, notwithstanding that the coercion may not reach the degree of shocking brutality thought necessary by respondent.

(G) Failure of the Trial Court to Give Petitioner's Requested Instructions Relating to the Voluntariness of the Blood Test and the Application of the Rochin Doctrine Was a Violation of Due Process.

The totality of testimony as to what occurred at the police station clearly establishes that the petitioner's blood was taken as a result of coercion. The repeated refusal to submit to the blood test before it was taken, his adamant declination to take any other sobriety tests, his request for legal or medical advice when blood was to be taken—all these facts elicited from the police officers establish that the blood test was taken without his consent. Respondent contends that petitioner finally consented and refers to the officer's testimony that petitioner agreed to the test. In the *Rochin* case, the deputy sheriff testified that Rochin did not protest nor resist when the stomach pump was used while Rochin said by way of stipulated testimony that he never consented and never submitted to the stomach pump. From all the circumstances of this case the Court can find that the petitioner was compelled to submit to the blood test.

Assuming by way of argument that the record reveals a conflict in the evidence as to petitioner's consent, we submit that the issue of voluntariness was not adjudicated below because the trial Court refused

to give petitioner's proposed instructions VIII, IX, X, and XI relating to the voluntariness of the blood test and the Rochin doctrine or any other instructions on these issues.

Petitioner submitted his proposed instructions VIII (R. 144), IX (R. 144), X (R. 144), and XI (R. 144), which embrace the federal question presented herein. These four proposed instructions were refused. (R. 132-137.)

Proposed instruction VIII provided as follows: "A person arrested because it appears that he is intoxicated, has the right to refuse to subject himself to any of the usual tests and to a blood test."

Proposed instruction IX provides as follows: "If any physical or other coercion frowned upon by due process is implied in taking a blood test without the consent and against the protests of a person arrested because it appears that he is intoxicated, the results of such blood test must be disregarded entirely."

Proposed instruction X provided as follows: "It is a denial of due process under the 14th Amendment of the Constitution of the United States and under the due process clause of the Constitution of the State of California, if brutal or shocking force is exerted in obtaining a blood test without the consent and against the protests of the person arrested because it appears that he is intoxicated, and the results of such blood test must be disregarded entirely."

Proposed instruction XI provided as follows: "It is a denial of due process under the 14th Amendment

of the Constitution of the United States if a blood test is exacted of a person arrested because it appears that he is intoxicated, by force and without the consent and against his protests, and the results of such blood test must be disregarded entirely."

No modified instructions embracing these issues were given to the jury. (R. 132-137.)

In coerced confession cases, under California procedure, the question of admissibility in the first instance is for the Court's determination but the jury must determine whether the confession was involuntary.

People v. Fox, 25 Cal. 2d 330, 340 (1944);
People v. Dabb, 32 Cal. 2d 491, 497 (1948).

The Due Process Clause requires that "the state approved instruction fairly raise the question of whether or not the challenged confession was voluntary, * * *"

Lyons v. Oklahoma, 322 U.S. 596, 601 (1944).

Therefore, instructions that fairly raise the voluntariness issue satisfy the 14th Amendment.

In the case before this Court, petitioner was denied an adjudication upon the issue of voluntariness by the trial Court's refusal to give the proposed instructions. The failure to present the voluntariness issue to the jury in any manner was a violation of Due Process.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the conviction of petitioner must be reversed.

Dated, San Francisco, California,
August 22, 1955.

JAY DARWIN,
Counsel for Petitioner.

ROBERT F. PECKHAM,
Of Counsel.

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HAROLD B. WILLEY, C

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 16

MARVIN STUART WALTON,
Petitioner,

vs.

PEOPLE OF STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Santa Clara.

BRIEF FOR RESPONDENT.

EDMUND G. BROWN,
Attorney General of the State of California,
CLARENCE A. LINN,
Assistant Attorney General of the State of California,
ARLO E. SMITH,
Deputy Attorney General of the State of California,
600 State Building, San Francisco 2, California,
Attorneys for Respondent.

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On Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Santa Clara.

BRIEF FOR RESPONDENT.

OPINION BELOW.

The Appellate Department of the Superior Court in and for the County of Santa Clara, State of California, affirmed the judgment of the Municipal Court without opinion.

QUESTIONS PRESENTED.

Was the blood sample taken from the appellant by force or by coercion, expressed or implied, so that the taking of the sample or the introduction into evidence of the analysis of the sample violates the due process clause of the Fourteenth Amendment, the constitutional prohibition against unreasonable search or seizure, or the privilege against self-incrimination?

Does the allocation of preliminary questions of fact between the judge and the jury violate due process?

STATEMENT.

Statement of the Case.

Petitioner was arrested for speeding, driving without a license, and drunk driving, all misdemeanors, on May 8, 1953. He was arrested in Santa Clara County by State Highway Patrolmen. The complaint charged only drunk driving (a misdemeanor). (R 2.) Petitioner entered a plea of not guilty and was tried by a jury in the Municipal Court. (R 2.)

The jury returned a verdict of guilty. (R 138.) Petitioner prosecuted an appeal in the Appellate Department of the Superior Court in and for Santa Clara County. The judgment below was affirmed without opinion.

Statement of the Facts.

While on a routine patrol, Officers Shannon and Daly of the California Highway Patrol observed petitioner speed out from the parking area of a restau-

rant, cross the southbound traffic lane, and cut in front of another vehicle traveling north. The time was approximately 10:00 o'clock p.m. on a Friday evening and the traffic was heavy. Appellant's vehicle then accelerated and ricocheted from a traffic island. Petitioner's speed was clocked at 60 to 65 miles per hour in a 35 mile an hour speed zone. (R 9, 10.)

After being stopped, petitioner refused to give his name, was staggering in his walk, was repetitious in his conversation, and failed to exhibit a California Driver's license. (R 14, 15.)

Petitioner was then taken to the Accident Investigation Bureau in San Jose. While en route, he stated he had been drinking. (R 16.) Officer Shannon testified that petitioner was under the influence of intoxicating liquor. (R 19.)

While at the Accident Bureau, petitioner refused to perform the balance and coordination test which is normally given as a test for sobriety. (R 16, 17.) He was also requested to give a sample of blood. He refused to do so at first, but later consented. Petitioner finally rolled up his sleeve, stuck his arm out and said, "Well, take it." (R 42.) Appellant was in no way forced to submit to the blood test. (R 43.)

The technician who withdrew the blood sample testified that petitioner consented to taking of the blood. (R 52.) The technician stated that the officers did not touch the defendant. (R 54.) This technician has been licensed by the State of California since 1930 to take blood samples. (R 50.)

This technician also testified that in his opinion the petitioner was under the influence of liquor at the time. He noted there was an odor of alcohol on his breath, that his face was flushed, that his clothes were slightly mussed, that his eyes were bloodshot, pupils dilated, and his attitude very antagonistic. (R 51.)

The chemist who analyzed this sample testified that it contained 24 one-hundredths of one per cent of alcohol, and that this amount of alcohol would result in intoxication. (R 24.)

Petitioner's testimony concerning the blood test in question is as follows:

> "They rolled up my left arm, sleeve of my left arm, and injected the needle and removed the sample, although I continued to object." (R 82.)

Petitioner admitted that he was not pushed around or manhandled by the officers. (R 83.) Likewise, after the completion of the booking procedures, which included fingerprinting and photographing, he was permitted to make a phone call, and in fact was released on bail within a very short time. (R 83, 84.)

SUMMARY OF ARGUMENT.

1. The question presented by petitioner's brief has never been properly raised in the California Courts and involves at most the question of the credibility of the witnesses.

A. The constitutional question of the involuntary and coerced taking of the blood sample

and the introduction of the analysis of this sample in evidence was never properly raised in the California Courts. Neither a proper objection nor a motion to strike the evidence of the analysis of the blood sample was ever made at the trial. Likewise, the matter was not pursued on appeal in the California Courts. The only objection ever made in the trial as to the admissibility of the evidence was on the ground that it was hearsay.

B. There is a conflict in the testimony between the police officers and petitioner as to what occurred at the time of the withdrawal of the blood sample. The trier of fact has resolved this conflict in favor of the People. When the facts are so resolved, no constitutional question is presented.

2. The allocation of preliminary questions of fact between judge and jury are questions of state law and raise no constitutional issues.

3. Neither the taking of the blood sample nor the introduction in evidence of the analysis of the blood sample involves a violation of the constitutional prohibition against unreasonable search and seizure, self-incrimination, or the due process clause of the Fourteenth Amendment.

A. The taking of the blood sample does not involve the constitutional protection against unreasonable search and seizure; it seeks to protect a person's home, effects and possessions, and does

not extend to the physical examination of an accused.

The Constitution prohibits only an unreasonable search and seizure. The withdrawal of a blood sample from the accused as an incident to a valid arrest for drunk driving is a reasonable exercise of the state's power to protect the health, welfare and safety of its citizens.

It has long been the rule at common law that relevant and reliable evidence is admissible however obtained. Likewise, this Court has determined that the admission of evidence illegally obtained does not violate the due process clause of the Fourteenth Amendment.

B. The due process clause of the Fourteenth Amendment does not embrace a right similar to that of the Fifth Amendment to refuse to be a witness against oneself.

The privilege against self-incrimination is limited to testimonial compulsion and has no application to the compulsory disclosure of physical condition.

C. Even assuming that the blood sample was taken in violation of petitioner's rights, nevertheless its admission in evidence would not fatally infect the fairness of the trial. The overwhelming majority of Anglo-American jurisdictions exclude the coerced confession on the basis of untrustworthiness. It is this possibility of falsehood that fatally infects the trial so as to render

the admission in evidence of a coerced confession a violation of the due process clause of the Fourteenth Amendment. The element of untrustworthiness does not exist as to the analysis of a blood sample taken from the defendant. Thus its introduction in evidence does not fatally infect the fairness of the trial. Its introduction in evidence is no violation of the Fourteenth Amendment.

D. The doctrine of the *Rochin* case has no application to the facts in this case. The person from whom the blood sample was taken was validly arrested for drunk driving, and he was in no way mistreated by the officers. The withdrawal of the blood sample is a simple, non-dangerous, common procedure. It is in no way brutal and shocking nor is it unreasonable.

A state pursuant to its power over the health, welfare and safety of its citizens could properly provide for the extraction of a blood sample from any person arrested for drunk driving. States have passed numerous analogous statutes requiring vaccination, blood tests prior to marriage, pregnancy blood tests, physical examination and Wasserman Tests for individuals reasonably believed to be infected with venereal disease. Likewise, nearly every adult male has been subjected to blood tests under The Draft Act and while in military service.

Numerous Anglo-American Courts have passed upon the admissibility of the analysis of blood

samples and upon the admission of analogous evidence, and have not been shocked.

ARGUMENT.

I.

THE OBJECTION TO THE ALLEGED INVOLUNTARY BLOOD SAMPLE IS RAISED FOR THE FIRST TIME IN THE PETITION FOR CERTIORARI.

Before a question may be raised in this Court, it must have been properly raised in the Court below. During the trial petitioner did not object to the introduction of the blood sample evidence upon the ground that it was taken by coercion. Although petitioner could have raised a due process objection on appeal even though no timely objection was made in the trial Court, he did not raise this question on appeal. (See *People v. Millum,* 42 Cal. 2d 524, 267 P. 2d 1039 (1954), a confession case.)

Petitioner contends that he objected to the introduction of the blood sample evidence upon the ground that the sample was obtained by force. A reading of pages 50, 51, 34 and 25 of the record will convince the Court that the sole basis of petitioner's objection to the introduction of this evidence was that the testimony of the results of the chemist's analysis was hearsay.

At no point in the record did appellant object to the introduction of the analysis of the blood sample on the ground that it was obtained in violation of due process, or the constitutional prohibition against

unreasonable search and seizure. Likewise, he did not assert that the introduction of this testimony violated the defendant's privilege against self-incrimination. At no point in the record did petitioner move to strike this evidence on any of these grounds. The only reference in the record to any violation of defendant's constitutional rights is found in the jury instructions which the defense counsel submitted to the judge for approval. (R 144.)

This conclusion is supported by the fact that the question here presented was not raised on appeal in the Appellate Department of the Santa Clara Superior Court. This fact is established by Statement on Appeal filed in the Appellate Department of the Superior Court. (R. 147.) In this statement appellant contends that the testimony concerning the blood sample analysis was hearsay; that the Court erred in refusing to give his instructions (instructions 8, 9, 10 and 11, R 144) concerning the blood tests and that the prosecutor exceeded the proper scope of cross-examination. It thus appears that no federal question was raised in the trial Court or on appeal.

The question of the involuntary nature of the taking of the blood sample is raised for the first time in this Court.

II.

THE PROPRIETY OF THE PROPOSED JURY INSTRUCTIONS IS PURELY A QUESTION OF STATE LAW.

Whether or not the proposed jury instructions concerning blood samples obtained by force correctly

state the law in the abstract is of no consequence. Whether such instructions should be given to a jury is purely a question to be determined by state procedure. The allocation of questions of fact between judge and jury does not raise a Fourteenth Amendment problem. (*Stein v. New York,* 346 U.S. 156 at 179 (1952) (confession case); *Snyder v. Massachusetts,* 291 U.S. 97 at 105 (1933), (abolition of a jury not a violation of due process-dictum).) Alleged involuntary confessions are treated variously. Some states treat the question as one for the judge, others as a question for the jury, and a third group permits the question to be passed on by both judge and jury.

The proper allocation of the functions of the judge and the jury as to preliminary questions of fact which affect admissibility is a question for the determination for the California Courts. The procedure used in this case has been determined to be proper for misdemeanor actions.

III.

RESOLVING THE CONFLICTS IN THE EVIDENCE IN FAVOR OF THE STATE, IT APPEARS THAT THE DEFENDANT CONSENTED TO THE TAKING OF THE BLOOD SAMPLE IN QUESTION. NO FORCE OR COERCION, EXPRESS OR IMPLIED, WAS USED BY THE POLICE OFFICERS.

The question presented by this case is primarily only one of credibility. The trier of the fact has resolved this question in favor of the People of the State of California. Resolving the conflicts in the

evidence, it appears that defendant's consent to the taking of the blood sample was free and voluntary.

The petitioner has overlooked an important appellate rule. Only evidence which is uncontradicted by the state in its version of the attendant circumstances is considered on appeal in determining whether there has been a denial of due process. (*Stein v. New York,* 346 U.S. 156, 181, 183-184 (1952); *Gallegos v. Nebraska,* 342 U.S. 55, 61-63 (1951); *Harris v. South Carolina,* 338 U.S. 68, 69 (1948); *Turner v. Pennsylvania,* 338 U.S. 62, 63 (1948).)

There is a conflict between the witnesses for the prosecution and the testimony of the petitioner. This conflict, however, has been resolved by the trier of fact in favor of the prosecution.

The testimony of Officer Shannon was that petitioner was asked to submit to a blood test. He raised his sleeve then changed his mind on the subject. This occurred a couple of times. He finally raised his arm and said, "take it." (R 42, 43.) Petitioner was not forced to submit to the blood test. (R 43.)

The technician who withdrew the blood sample testified that the officers did not touch the defendant. (R 54.) He also testified that petitioner consented to the taking of the blood sample. (R 52.)

Petitioner admitted that he was not shoved around or manhandled. (R 83.)

It is well established in confession cases that a confession may be free and voluntary even though the petitioner is in custody and is questioned by officers

and not informed of his right to counsel. (*People v. Amaya,* 40 Cal. 2d 70, 76, 251 P. 2d 324 (1952); *People v. Hoyt,* 20 Cal. 2d 306, 314, 125 P. 2d 29 (1942); *United States v. Heitner,* 149 Fed. 2d 105, 108 (1945).)

These same principles have been applied by state Courts to the taking of samples of body fluids. Thus, cases have held that defendant need not be warned of his right to counsel before taking the blood sample. (*Heath v. State,* 156 Tex. Cr. R. 563, 244 S.W. 2d 815 (1952); *People v. Ward,* 307 N.Y. 73, 12 N.E. 2d 211 (1954).)

Also, the fact that defendant was intoxicated at the time does not render the consent to the taking of a blood sample involuntary. (*Halloway v. State,* 146 Tex. Cr. R. 353, 175 S.W. 2d 258 (1943); *State v. Sturtevant,* 96 N.H. 99, 70 A. 2d 909 (1950).)

The alleged forced withdrawal of a blood sample is, thus, without substance when any conflict between opposing witnesses is resolved in favor of the prosecution.

IV.

ASSUMING FOR PURPOSES OF DISCUSSION THE TAKING OF THE BLOOD SAMPLE WAS BY FORCE AND COERCION, NEVERTHELESS, NEITHER THE TAKING OF THE SAMPLE NOR THE INTRODUCTION IN EVIDENCE OF THE RESULTS OF THE ANALYSIS OF THE SAMPLE VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE, THE PRIVILEGE AGAINST SELF-INCRIMINATION, OR ANY GENERALIZED CONCEPT OF DUE PROCESS.

A. The Taking of a Blood Sample Against the Will of an Arrested Person Involves No Violation of the Constitutional Provisions Against Unreasonable Search and Seizure, Nor Does Admission in Evidence of the Results of the Analysis of Such Samples Violate the Fourteenth Amendment.

The argument has been made that the taking of a blood sample or the physical examination of a person solely to determine his physical condition is not a search or seizure within the intent of the constitutional provisions. The provision against unreasonable search and seizure was intended to protect persons in their possessions and effects. It seeks to prevent unwarranted intrusion into one's home and unwarranted search of one's person for papers and possessions. Possessions and the sanctity of the home are protected by the constitutional provision, but it does not prohibit disclosure of the physical condition of an arrested person. (See Ladd and Gibson, The Medico-Legal Aspects of the Blood Test to Determine Intoxication, 24 Iowa L. Rev. 191 (1939); *State v. Small,* 233 Iowa 1280, 11 N.W. 2d 377 (1943).)

Assuming that the extraction of a blood sample involves a search and seizure, nevertheless, such a search and seizure offends no constitutional right.

The Constitution prohibits only an unreasonable search and seizure. The rule at common law and in federal Courts provides for a reasonable search incident to a valid arrest. (*Harris v. United States,* 331 U.S. 145 (1947).) Such a search does not violate the constitutional prohibition against unreasonable search and seizure. In the present case the blood sample was extracted as an incident to defendant's valid arrest for drunk driving, just as his fingerprints and photograph were taken.

Of course, the very statement of the problem in terms of reasonable and unreasonable search and seizure implies that the solution is more or less subjective.

We feel that the extraction of the blood sample is a reasonable action incident to a valid arrest for drunk driving. We are not alone in our view. Our view finds support in numerous judicial and legislative decisions on this and analogous problems; e.g., see Interim Report of the New York State Joint Legislative Committee on Motor Vehicle Problems, Chemical Tests for Intoxication, p. 20, 1953. Since the argument that the extraction of blood samples from persons arrested for drunk driving is a reasonable search, is identical with the argument that such action does not violate any generalized concept of due process, this question will be discussed at length under heading IV(C).

Furthermore, even assuming that extraction of the blood sample was an unreasonable search and seizure, the introduction of the evidence of the analysis of such

sample would not violate the due process clause of the Fourteenth Amendment. (*Wolf v. Colorado,* 338 U.S. 25 (1948); *Irvine v. California,* 347 U.S. 128 (1953).) Indeed, the common law has always admitted all relevant and competent evidence, whether or not illegally obtained. Likewise, other common law jurisdictions, including a majority of the states, follow an identical rule. Certainly, if due process is measured by Anglo-American concepts of fairness, by historical practice, and the collected wisdom of common law jurisdictions, the introduction in evidence of illegally obtained evidence is not violative of due process.

B. The Privilege Against Self-incrimination Is Not Embraced in the Due Process Clause of the Fourteenth Amendment, Nor Does the Privilege Have Any Application to the Facts of This Case.

This Court has determined that the due process clause of the Fourteenth Amendment does not embrace a right similar to that guaranteed by the Fifth Amendment to refuse to be a witness against oneself. (*Twining v. New Jersey,* 211 U.S. 78 (1908); *Adamson v. California,* 332 U.S. 46 (1947).)

The history of the privilege against self-incrimination establishes that it prohibited testimonial compulsion and has no application to compulsory disclosure of physical condition—such as blood tests. For a discussion of the history of the privilege see Inbau, Self-incrimination—What can an accused person be compelled to do, 28 Journal of Criminal Law and Criminology 261; Ladd and Gibson, The Medico-Legal

Aspects of the Blood Tests to Determine Intoxication, 24 Iowa L. Rev. 191 (1939); Morgan, The Privilege Against Self-incrimination, 34 Minn. L. Rev. 1.

Current legal thinking supports this view. Wigmore, 3rd ed., Vol. VIII, p. 362, sec. 2263, states the principle as follows:

> "Looking back at the history of the privilege (*ante,* sec. 2250) and the spirit of the struggle by which its establishment came about, the object of the protection seems plain. It is the employment of legal process to *extract from the person's own lips* an admission of his guilt, which will thus take the place of other evidence."
>
> * * * * * * *
>
> "In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but *testimonial compulsion.* The one idea is as essential as the other."

Likewise, this Court in an opinion written by Mr. Justice Holmes, *United States v. Holt,* 218 U.S. 245, 252 (1910), stated:

> "Another objection is based upon an extravagant extension of the Fifth Amendment. A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statements inadmissible, and that it should be excluded for the same reasons. But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort com-

munications from him, not an exclusion of his body as evidence when it may be material."

This is also the view of the leading authorities as reflected in the American Law Institute's Model Code of Evidence (1942). Rule 203 of the Model Code of Evidence provides that a person may refuse to disclose to a public official any matter that will incriminate him, but rule 205 says that "No person has a privilege under Rule 203 to refuse (a) to submit his body to examination for the purpose of discovering or recording his corporal features and other identifying characteristics, or his physical or mental condition, or (b) to furnish or to permit the taking of samples of body fluids or substances for analysis."

Likewise, the question as to the application of the privilege to the introduction in evidence of the analysis of blood samples has arisen in numerous state cases. The state Courts have overwhelmingly determined that the privilege did not apply. State Courts have refused to reject blood sample evidence on the self-incrimination ground. (*People v. Haeussler,* 41 Cal. 2d 252, 260 P. 2d 8 (1953); *State v. Cram,* 176 Ore. 577 (160 P. 2d 283, 289, 164 A.L.R. 952) (1945); *State v. Sturtevant,* 96 N.H. 99 (70 A. 2d 909, 911-912) (1950); *State v. Ayres,* 70 Idaho 18 (211 P. 2d 142, 144) (1949); *State v. Alexander,* 7 N.J. 585 (83 A. 2d 441, 445) (1951); *Block v. People,* 125 Colo. 36 (240 P. 2d 512, 515-516) (1951), cert. den. 343 U.S. 978 (72 S.Ct. 1076, 96 L.Ed. 1370); *State v. Cash,* 219 N.C. 818, 15 S.E. 2d 277 (1941); *State v. Small,* 233 Iowa 1280, 11 N.W. 2d 377 (1943).)

In analogous situations the Courts have held that no violation of the privilege against self-incrimination was involved. For example, results of the chemical test of breath specimens, *Jones v. State,* 159 Tex. Cr. 29, 261 S.W. 2d 161 (1952), cert. den. 346 U.S. 830; *State v. Berg,* 76 Ariz. 96, 259 P. 2d 261 (1953).

One writer has set out numerous factual situations analogous to the present problem where the privilege against self-incrimination has been held inapplicable. See Inbau, Self-incrimination—What can an accused person be compelled to do?, 28 Journal of Criminal Law and Criminology 261.

C. The Introduction in Evidence of the Results of the Analysis of the Blood Sample Did Not Violate Due Process; the Act of Taking the Blood Sample in No Way Fatally Infected the Fairness of the Trial. The Decision of Rochin v. California, 342 U.S. 165 (1951), Should Be Reexamined.

We do not doubt the power of this Court to determine that the taking of a blood sample is a violation of due process. This question depends upon the meaning of the term "due process." This concept appears to be like a middle-aged man's waistline; it just keeps expanding, and its chief limitation is personal self-control. We do, however, doubt the soundness of the decision in *Rochin v. California,* 342 U.S. 165 (1951). The admission in evidence of the narcotic in the *Rochin* case involved no violation of the Fourteenth Amendment as measured by historical and present day concepts applicable to the admissibility of confessions or other illegally obtained evidence.

Let us assume for the purpose of discussion that the taking of the blood sample was an unreasonable search and seizure or violated some other constitutionally protected right. Nevertheless, the results of the analysis of the blood sample is reliable and competent evidence of petitioner's condition at the time he was arrested for drunk driving.

Indeed, the theory of the Fourteenth Amendment as enunciated by this Court in numerous decisions requires that the unfairness must "fatally infect the trial." (*Lisenba v. California,* 314 U.S. 219, 236 (1941).) Prior to the decision of *Rochin v. California,* 342 U.S. 165 (1951), this Court had adhered to that doctrine. In every instance the violation of due process entered into and infected the very judicial proceeding. Thus, for example, *Powell v. Alabama,* 287 U.S. 45 (1932), involved the deprivation of the right of an accused to counsel; *Snyder v. Massachusetts,* 291 U.S. 97 (1933), involved the right of the accused to be confronted with the witnesses against him; *Moore v. Dempsey,* 261 U.S. 86 (1923), involved right of an accused to a trial free from mob domination; *Mooney v. Holohan,* 294 U.S. 103 (1934), involved alleged knowing use of perjured testimony by the prosecution; *Stein v. New York,* 346 U.S. 156 (1952) coerced confession.

Indeed, the fact that someone acted unconstitutionally in obtaining the evidence does not affect its admissibility. The defendant's rights were invaded prior to the introduction of the evidence in the Court of law. The admission of relevant and reliable evidence

is no violation of his right. A prior violation of his right does not fatally infect the trial unless the evidence does not properly furnish a "premise from which a civilized forum will infer guilt." (*Lyons v. Oklahoma,* 322 U.S. 596, 605 (1944).)

The decision in *Rochin v. California,* 342 U.S. 156 (1951), recognizes this difficulty but attempts to avoid this question by analogizing the conduct condemned in the *Rochin* case to that in the confession cases. The opinion of the Court asserts that the fact that a coerced confession is unreliable and presumptively false, is not the reason for excluding such confessions. The basis upon which a violation of the Fourteenth Amendment is predicated in confession cases is the misconduct in obtaining them. We submit that this premise of the *Rochin* case is historically unsound, is not in accord with the Anglo-American concept as to the admissibility of confessions, or the accumulated wisdom of the common law jurisdictions.

The exclusion of confessions on the ground of their unreliability dates from *Warickshall's* case, *One Leich Crown,* C.R.C. 3rd Ed. 298. This has been the fundamental reason for the exclusion of such confessions ever since. See 3 *Wigmore,* p. 246, sec. 822, p. 249, sec. 823. This is also the reason stated by the overwhelming majority of states. See, for example, *People v. Burwell,* 44 Cal. 2d ..... (44 A.C. 15); *Hendrickson v. State,* 93 Okla. Cr. 379, 229 P. 2d 196; *Owens v. Commonwealth,* 186 Va. 689, 43 S.E. 2d 895 (1947); *State v. LaPean,* 247 Wis. 302, 19 N.W. 2d 289 (1945). Also see 30 *Canada Bar Review* 747.

This Court itself has recognized that the unreliability of a coerced confession is the element which fatally infects the trial and renders its admission in evidence a violation of due process. (*Stein v. New York,* 346 U.S. 156, 181, 193 (1952); *Lyons v. Oklahoma,* 322 U.S. 596, 605 (1944).)

This Court in *Stein v. New York,* 346 U.S. 156 (1952) at 192, stated:

> ". . . Coerced confessions are not more stained with illegality than other evidence obtained in violation of law. But reliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A forced confession is a false foundation for any conviction, while evidence obtained by illegal search and seizure, wire tapping, or larceny may be and often is of the utmost verity. Such police lawlessness therefore may not void state convictions while forced confessions will do so."

Since the evidence of the analysis of a blood sample and the analysis of the contents of other body fluids may be completely reliable and competent evidence of guilt not subject to falsehood, its admissibility does not violate due process even though the act of taking such sample may or may not have violated some constitutional or statutory right of the defendant.

D. The Due Process Concept as Interpreted by the Case of Rochin v. California, 342 U.S. 156 (1951), Has No Application to Withdrawal of a Blood Sample.

The decision of *Rochin v. California,* 342 U.S. 156 (1951), has invoked numerous interpretations as to its theory and its application to various factual situations. Thus, the *Rochin* case has been interpreted to prohibit an invasion of the body (*State v. Berg,* 76 Ariz. 96, 259 P. 2d 261 (1953); to exclude evidence obtained as a result of violent and brutal conduct; *People v. Haeussler,* 41 Cal. 2d 252, 260 P. 2d 8 (1953); to exclude evidence obtained by a whole procedure of force and not merely forceful stomach pumping, Freund Supreme Court 1951 Term, 66 Harv. L. Rev. 122 (1952); 40 Cal. L. Rev. 31; and to violence and force applied to one illegally arrested. For discussion see generally 41 Cal. L. Rev. 728.

We feel that under the proper theory the *Rochin* case prohibits only brutal and shocking force as applied to one illegally arrested or detained. Thus, it does not upset cases such as *Ash v. State,* 139 Tex. Cr. R. 420, 141 S.W. 2d 341 (1940) (enema to recover stolen rings); *Rex v. Brezack,* 2 Dominion L.R. 265 (1950) (forcefully opening an accused's mouth); *People v. Dawson,* 127 Cal. App. 2d 375, 273 P. 2d 938 (1954) (force applied to compel accused to spit out narcotics); *Taylor v. State,* 213 P. 2d 588, 591, 594, Okla. Crim. (1950) (the defendant was given castor oil after X-ray showed him harboring jewelry).

Certainly, the extraction of a blood sample from a person legally arrested is not shocking, nor brutal,

nor in any way offensive to civilized standards if measured by statutes and decisions of the overwhelming majority of common law jurisdictions. The crucial test of whether such conduct is unreasonable, much less brutal and shocking, is whether the state legislature under its power to protect the health, welfare and safety of its citizens could validly pass legislation requiring persons arrested for drunk driving to submit to a blood test.

The increase in the number of highway accidents and deaths has been and is a major problem throughout the nation. Drinking drivers are a menace to the safety of the highways. In twenty-four (24) out of one hundred (100) fatal accidents, the driver or pedestrian had been drinking. Among the drivers involved in fatal accidents for whom condition was stated, eighteen (18) out of one hundred (100) had been drinking. Among the reporting states, drinking drivers involved in fatal accidents ranged from five (5) out of one hundred (100) to forty-one (41) out of one hundred (100). See Accident Facts, 1954 Edition, National Safety Council, page 52. The annual report of the California Highway Patrol indicates that the driver had been drinking in approximately 23% of all rural motor vehicle traffic accidents in California. Certainly, a state may exercise its power on behalf of the health, welfare and safety of its citizens and by legislation require anyone arrested for drunk driving to submit to a blood test.

A blood analysis aids in determining the innocent as well as in determining the guilty. There are sev-

eral conditions, such as the syndrome of diabetic coma and the administration of numerous drugs, including the anti-histamines which would produce conditions comparable to alcoholic inebriety. (14 Md. L. Rev. 111, 136, 137.)

States exercised their power to protect the health, welfare and safety of their citizens by passing analogous legislation. Thus, the states have required citizens to submit to vaccinations, *Jacobson v. Massachusetts*, 197 U.S. 11 (1904), and to submit to a blood test as a condition of getting married, California Civil Code Section 79.01. A similar test is required of all pregnant women, California Health and Safety Code Section 21402.

Likewise, numerous states have required persons to submit themselves to medical examinations, including Wasserman Tests on probable cause that they are infected with venereal diseases. (See Health and Safety Code, Sections 2554 and 21332.) Also see 22 A.L.R. 1189 (compulsory examination for venereal disease.) Likewise, innumerable young men have been subjected to physical examinations, including blood tests under The Selective Service Act and the Universal Military Training and Service Act, 50 U.S.C. App. Sec. 454, and while in the military service. (See A.R. 40-340, A.R. 40-365.) Also see *Bratcher v. United States*, 149 Fed. 2d 742, 745. There statutes would indicate that there is nothing unreasonable in such a requirement. The state has the power to require an individual to submit to blood tests when arrested for drunk driving in order to better protect the safety

of its citizens. If the legislature has such a power, then the police have an implied power to withdraw blood samples, or at least the withdrawal of such a blood sample by the police officer is not constitutionally unreasonable. Police have exercised such implied powers in the development of many of their procedures, such as fingerprinting and photographing.

Likewise, the extraction of blood samples is certainly not brutal or shocking or even unreasonable when viewed in the light of the many decisions in England, Canada and the United States.

Thus, in several cases the state Courts have approved the withdrawal of blood samples from an accused while he was unconscious and thus unable to consent. See *People v. Haeussler,* 41 Cal. 2d 252, 260 P. 2d 8 (1953); *State v. Cram,* 176 Ore. 577, 160 P. 2d 283 (1945); *Kerschwing v. Farrar,* 114 Colo. 421, 166 P. 2d 154 (1946); *People v. Tucker,* 88 Cal. App.2d 333, 198 P. 2d 941 (1948); *State v. Ayres,* 70 Idaho 18, 211 P. 2d 142 (1949); *Hicks and Bovey v. State,* 93 N.Y.S. 2d 569 (Ct. of Claims, N.Y., 1949); *People v. Block,* 125 Colo. 36, 240 P. 2d 512 (1952), cert. den. 343 U.S. 978; *People v. Howell,* 41 Cal. 2d 252, 260 P. 2d 8 (1953), cert. denied 347 U.S. 931; *Breithaupt v. Abram,* 58 N.M. 385, 271 P. 2d 827 (1954).

Likewise, several decisions have stated that the analysis of blood samples would be admissible even though taken against the defendant's will. (*State v. Cash,* 219 N.C. 818, 15 S.E. 2d 277 (1941); *State v. Berg,* 76 Ariz. 96, 259 P. 2d 261 (1953); *People v.*

Kiss, 125 Cal. App. 2d 138, 143, 269 P. 2d 924 (1954); *Rex v. McNamara,* 1951 Ont. Reports 6, 11.) Also see *Rex v. McIntyre* (1952), 2 Dominion Law Report 713; *Rex v. Nowell* (1948), 1 A11 E.R. 794. Also see Rule 205, Model Code of Evidence, American Law Institute.

Likewise, an officer can, over the objection of the accused and without his consent, open the accused's hand to find evidence, *State v. Green,* 121 S.C. 230, 114 S.E. 317 (1922); scrape under accused's finger nails, *State v. McLaughlin,* 138 La. 958, 70 So. 925 (1916); take off accused's shoes for the purpose of making footprints, *Biggs v. State,* 201 Ind. 200, 167 N.E. 129 (1929); take off accused's clothing for comparison and tests, *People v. Trujillo,* 32 Cal. 2d 105, 194 P. 2d 681 (1948); *State v. Aspara,* 113 La. 940, 37 So. 883 (1904); give accused an enema to recover jewelry swallowed by him, *Ash v. State,* 139 Tex. Crim. Rep. 420, 141 S.W. 2d 341 (1940); *Taylor v. State,* Okla. Crim. App., 213 P. 2d 588 (1950); take accused's fingerprints, *People v. Sallow,* 165 N.Y.S. 915 (1917); *United States v. Kelly,* 55 Fed. 2d 67 (1932); compel accused to discharge narcotics from his mouth which he concealed when arrested, *United States v. Ong Sui Hong,* 36 P. Is. 735 (1917); *People v. Dawson,* 127 Cal. App. 2d 375, 273 P. 2d 938 (1954); *Rex v. Brezack,* 2 Dominion L.R. 265 (1950); *Jones v. State,* 90 Ga. App. 761, 84 S.E. 2d 124 (1954); require accused to submit to compulsory physical examination, *State v. Green,* ..... S.C. ....., 86 S.W. 2d 598 (1955); require a man to put on a coat

to see whether it fits, *Holt v. United States,* 218 U.S. 245 (1910); *Green Lake County v. Domes,* 347 Wis. 90, 18 N.W. 2d 348 (1945); *Skidmore v. State,* 59 Nev. 320, 92 P. 2d 979 (1939).

The taking of an accused's blood over his objection and without his consent is within the power of peace officers and in the same category as above. *Davis v. State,* 189 Md. 640, 57 A. 2d 289 at 291, stated:

> "... There is no substantial difference between obtaining a specimen of blood from an accused and obtaining his fingerprints, or physical property, ..."

To the same effect is *State v. Alexander,* 7 N.J. 585, 83 A. 2d 441 (1941).

This Court itself has indicated that the taking of body fluid samples and the introduction into evidence of the analysis of these samples does not violate due process.

In *Rochin v. California,* 342 U.S. 156 (1951), at page 174, the Court states:

> "In deciding this case we do not heedlessly bring into question decisions in many States dealing with essentially different, even if related, problems. We therefore put to one side cases which have arisen in the State courts through use of modern methods and devices for discovering wrongdoers and bringing them to book. It does not fairly represent these decisions to suggest that they legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record ..."

Thus, it appears that the taking of a blood sample against the will of the accused is not brutal and shocking or even unreasonable and the introduction in evidence of the analysis of this sample does not violate due process. The officers acted properly. The officers obtained the blood sample as an incident to a valid arrest of the accused for drunk driving. They exercised an ancient power in a modern manner.

Dated, San Francisco, California,
September 28, 1955.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General of the State of California,
CLARENCE A. LINN,
Assistant Attorney General of the State of California,
ARLO E. SMITH,
Deputy Attorney General of the State of California,
Attorneys for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1955

No. 16

MARVIN STUART WALTON,
Petitioner,
v.
PEOPLE OF STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Santa Clara.

PETITIONER'S REPLY BRIEF

JAY A. DARWIN,
68 Post Street,
San Francisco 4, California,
Attorney for Petitioner.

ROBERT F. PECKHAM,
68 Post Street,
San Francisco 4, California,
Of Counsel.

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PETITIONER'S REPLY BRIEF

I.

Respondent asks the Court to repudiate the *Rochin* decision. The adoption of the argument advanced for this purpose would cause serious retrogression in the law relating to coerced confessions as well as to the law of forcible extraction of real evidence.

Respondent uses such language as follows:

> "Indeed, the fact that someone acted unconstitutionally in obtaining the evidence does not affect its admissibility. The defendant's rights were invaded prior to the introduction of the evidence in the Court of law. The admission of relevant and reliable evidence is no

violation of his right." (Respondent's brief, pp. 19-20.)

. . . . . .

"The opinion of the Court asserts that the fact that a coerced confession is unreliable and presumptively false, is not the reason for excluding such confessions. The basis upon which a violation of the Fourteenth Amendment is predicated in confession cases is the misconduct in obtaining them. We submit that this premise of the *Rochin* case is historically unsound, is not in accord with the Anglo-American concept as to the admissibility of confessions, or the accumulated wisdom of the common law jurisdictions." (Respondent's brief, p. 20.)

The coerced confession cases have been the result of the application of two constitutional standards:

First, a confession causes the reversal of a case where extracted by police methods causing too great a likelihood of falsity.

Brown v. *Mississippi*, 297 U.S. 278 (1936)
Chambers v. *Florida*, 309 U.S. 227 (1940)

Second, a conviction will be reversed when the confession is extracted by police means offensive to due process regardless of the veracity of the confession.

Ashcraft v. *Tennessee*, 322 U.S. 143 (1944)
Malinski v. *New York*, 324 U.S. 401 (1945)
Haley v. *Ohio*, 332 U.S. 596 (1948)

In *Lisenba* v. *California*, 314 U.S. 219, 236, Mr. Justice Roberts, in the opinion of the Court, stated:

"The aim of the requirement of due process is not to exclude presumptively false evidence but to prevent fundamental unfairness in the use of evidence, whether true or false."

No convincing need has been presented to this Court to limit itself to the common law rationale.

Rochin was simply an application of the second standard to the extraction of real evidence by offensive police methods. We submit that a repudiation of *Rochin* would serve only as an encouragement to offensive police practices. To

lift the restraint upon such offensive state police methods would be a calamity in the constitutional realm of civil liberties.

II.

Respondent contends that the extraction of blood is a reasonable search of petitioner's person incident to his arrest and compares the procedure with that of fingerprinting and photographing the petitioner.

The Fourth Amendment of the U. S. Constitution provides in part:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated * * *"

In *Wolf* v. *Colorado,* 338 U.S. 632 (1950), the Court held that the security of one's privacy against police intrusion —the core of the Fourth Amendment—is a right which is implicit in the concept of ordered society and, as such, is enforceable against the states through the due process clause of the Fourteenth Amendment. Therefore, the forcible extraction of blood from his veins for use as evidence of his intoxication in a criminal proceeding constitutes a search and seizure within the meaning of the Fourth Amendment. The question arising then is: Does such a forcible extraction of blood over protest amount to an unreasonable search, even when done incident to an arrest? It is our view that it does. We are not alone in the view that the reasonableness of the search incident to arrest ends when the police forcibly invade the body to extract evidence against the will and over the protest of the accused.

U. S. v. *Willis,* 85 F. Supp. 745 (D.C. Calif. 1949)
Re *Guzzardi,* 84 F. Supp. 294 (D.C. Texas 1944)

In *U. S.* v. *Willis,* the defendant was taken to a hospital and his stomach was pumped. The court held that this was an unreasonable search, irrespective of whether the defendant was under lawful arrest. We note with interest what the Judge there stated:

> "* * * if a search such as was made in the instant case may be approved, would it not likewise follow that if narcotics, after being swallowed, had passed from the stomach to the blood stream, some officers might feel it incumbent upon them to drain the defendant of part of his life blood in an effort to discover the hidden evidence?"

We believe that once the Court permits the intrusion of the sanctity of the individual person under the guise of reasonable search incident to arrest, the invitation will have been tendered for further official invasion of the person. It is to be noted that the *Willis* case has met with favorable comment.

Marq. L. R. 34: 52-55
Temp. L. Q. 23: 418-420
U. Detroit L. J. 13: 220-222

The extraction of blood from petitioner in the instant case constitutes an unreasonable search irrespective of whether done as incident to a valid arrest or under the authority of a search warrant. Such a search has not been viewed as reasonable within the Fourth Amendment.

Harris v. *U. S.*, 331 U.S. 145
Weeks v. *U. S.*, 232 U.S. 383 at 392-393
Gouled v. *U. S.*, 225 U.S. 298 at 309
Carroll v. *U. S.*, 267 U.S. 132 at 149-150
Agnello v. *U. S.*, 269 U.S. 20 at 30
U. S. v. *Lefkowitz*, 285 U.S. 452 at 465-466

In *Harris* v. *U. S.*, *supra*, the case respondent cited for the proposition that the search here was reasonable, the Court stated the rule thusly:

> "This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime."

The object of the search here—the extraction of blood—was to obtain evidentiary material, analogous to private papers and documents containing incriminating revelations. Therefore, the extraction of blood under these circumstances is an unreasonable search and seizure.

Respondent, at page 14 of its brief, cites the Interim Report of the New York State Joint Legislative Committee on Motor Vehicles, "Problems, Chemical Tests for Intoxication," in support of its view that the search here is reasonable. It is interesting to note that the New York Legislature after due consideration of all the inherent constitutional problems involved here, and contrary to the cited Report, did not enact a law empowering the police to extract bodily fluids by force.

New York Laws, 1953, New York Vehicles and Traffic Law, Sec. 71a

The New York statute provides in substance:

1. Any person who operates a motor vehicle in this state shall be deemed to have given his consent to a chemical test of his breath, blood, urine, or saliva for the purpose of determining the alcoholic content of his blood provided that such test is administered at the direction of a police officer having reasonable grounds to believe such person to have been driving in an intoxicated condition and in accordance with the rules and regulations established by the police force of which he is a member. If such person, having been placed under arrest, has thereafter been requested to submit to such chemical test, the test shall not be given but the commissioner shall revoke his license or permit to drive; provided, however, the commissioner shall grant such person an opportunity to be heard but a license or permit may upon the basis of a sworn report of the police officer that he had reasonable grounds to believe such arrested person to have been driving in an intoxicated condition and that said person had refused to submit to such test, be temporarily suspended without notice pending the determination upon any such hearing.

2. Upon the request of the person who was tested, the results of such test shall be made available to him.

3. Only a physician acting at the request of a police officer can withdraw blood for the purpose of determining the alcoholic content therein. This limitation shall not apply to the taking of a urine, saliva or breath specimen.

4. The person arrested shall be permitted to have a physician of his own choosing administer a chemical test in addition to the one administered at the direction of the police officer.

We find in this statute an effort to equate the problem of intoxicated drivers as a menace to society, with the constitutional limits of proof of such drunkenness. The Council of State Governments has proposed a similar model law for the states.

Journal of Crm. Law, Crminol. and Pol. Sci. 45:542, Note 6

A contrast between the operation of this statute and the facts of the instant case serves to illustrate the unreasonable nature of the search here. Under the New York law, if an accused refuses a test for intoxication, the test is not given by force but the driving privileges of the accused are revoked. A further safeguard included in the statute, but refused petitioner here, is permission to have a physician of his own choosing administer a chemical test in addition to the one given by the police doctor. Only a physician can be used by the police for the purpose of extraction of blood.

Contrary to the contention of respondent, the only state having met the problem here presented, with comprehensive legislation, has provided reasonable procedures for chemical tests without the use of force and its consequent constitutional problems.

Notwithstanding the decisions of *Wolf* and *Irvine*, we submit that evidence obtained as a result of wrongful invasion of the person should be excluded and the conviction reversed. For the invasion of the person by means of coercion to extract blood is more offensive to our concepts of the sanctity of the individual than a trespass to seize his property. We have already noted in our opening brief that the

court has recognized in *Irvine* that the coercive invasion of the person motivated a different result from a coercive invasion of his property.

The exclusion of such evidence is a necessary safeguard to the protection of this constitutional right. Mere judicial declaration of the unconstitutionality of such police conduct has been of no avail. The weakness of other ineffectual remedies available to the accused is familiar to the Court. Nor can we look to the Civil Rights Statute as an effective deterrent as was seen from the reference to the Department of Justice for investigation of the police conduct in *Irvine*. In a letter to the Stanford Law Review, dated February 15, 1955, Warren Olney III, Assistant Attorney General in Charge of the Criminal Division, wrote:

> "When the [complaint against the officers involved in the *Irvine* case] came to our attention, the Federal Bureau of Investigation conducted a full investigation * * * The results of that investigation revealed some significant facts which did not appear in the records or the opinion of the Supreme Court and were apparently unknown to the Court at the time of its review of the case * * * [T]he police officers who placed the detectograph or microphone in * * * Irvine's home were acting under orders of the Chief of Police, who in turn was acting with the full knowledge of the local District Attorney. This fact, together with * * * Section 653h of the California Penal Code, [which] expressly provide[s] for such conduct, forced us to the conclusion that it would be both useless and inadvisable to present [the] matter to the Federal grand jury. Our decision was largely influenced by the belief that the Government * * * would not be able to satisfy the rigid standard of intent imposed by the Supreme Court * * * in the *Screws* case. * * *"
>
> 7 Stanford Law Review 76 at 94, Note 75

Repelled by the continued disregard of constitutional safeguards on the part of law enforcement officers in this connection, the Supreme Court of California recently repudiated its former rule and held that such evidence is inadmissible.

People v. *Cahan,* 44 Adv. Cal. 461, 282 P. (2d) 905 (April 27, 1955)

Under the law of California today, the forcible extraction of blood from an accused, would be an unreasonable search and seizure, and would not be admissible. In the case of *People* v. *Haeussler,* 41 Cal. 2nd 252, 260 P. (2d) 8 (1953), cited by respondent at pp. 17, 22, and 25 of its brief, decided before *Irvine,* and its consequent repercussion in *People* v. *Cahan, supra,* the California Supreme Court indicated that the blood extracted from Mrs. Haeussler was improper and amounted to an unreasonable search and seizure, but because the federal exclusionary rule had not yet been adopted, refused to reverse.

III.

Respondent contends that *Rochin* prohibits only brutal and shocking force as applied to an accused who is illegally detained. This view would cause this Court to impose an unnecessarily retrogressive limitation in this field. A distinction drawn on the basis of the legality of the detention would sanction brutal and shocking force if the detention was legal. Again, such an interpretation would only be an invitation to further infringement upon constitutional rights.

Respondent argues that the extraction of blood by force incident to an arrest is not offensive to civilized standards. In our opening brief, we anticipated this attack when we urged that what is offensive to the community's sense of fairness is the use of force to extract evidence from the body of an accused, against his will. Respondent states that the crucial test of whether such conduct is unreasonable and offensive is whether a state legislature could pass legislation requiring persons arrested for drunk driving to submit forcibly to a blood test. Certainly the public policy considerations to curb drunk drivers like those to eradicate narcotic traffic, are urgent and compelling. However, we submit that state law enforcement is not so lacking in resourcefulness, that the only solution is one that erodes

the constitutional rights of the individual. Constitutional means are available to combat the problem of the drunk driver. We have already discussed above the New York legislation whose provisions do not require a resort to physical force.

None of the legislative measures cited by Respondent on page 24 of its brief, where blood analysis is provided is for the purpose of extracting evidence to be used against an accused in a criminal prosecution. All such legislative measures relate to the use of the police power to protect the citizens' health, welfare and safety, and do not have as their purpose the procuring of evidence from the person to be used against him as the accused.

CONCLUSION

For the reasons stated, it is respectfully submitted that the conviction of petitioner must be reversed.

Dated: San Francisco, California

October 15, 1955

JAY A. DARWIN,
Counsel for Petitioner.

ROBERT F. PECKHAM,
Of Counsel.

Decisions Per Curiam.

No. 16. WALTON *v.* CALIFORNIA. Certiorari, 348 U. S. 894, to the Superior Court of California, Appellate Department, County of Santa Clara. Argued October 17, 1955. Decided October 24, 1955. *Per Curiam:* A majority of the Court are of opinion that the record in this case fails to establish that a federal question is presented and for that reason the writ of certiorari is dismissed. MR. JUSTICE REED and MR. JUSTICE DOUGLAS dissent. THE CHIEF JUSTICE did not participate in the consideration or decision of this case. *Robert F. Peckham* and *Jay A. Darwin* argued the cause and filed a brief for petitioner. *Clarence A. Linn,* Assistant Attorney General of Cali-

fornia, argued the cause for respondent. With him on the brief were *Edmund G. Brown*, Attorney General, and *Arlo E. Smith*, Deputy Attorney General.